SUPREME COURT U. S.

IN THE

Supreme Court of the United States

OCT 28 1968
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October Term
No. 699

ROBERT S. DALY,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the Appellate Department of the Superior Court of the State of California for the County of Santa Clara.

STANLEY FLEISHMAN,
1680 North Vine Street,
Los Angeles, Calif. 90028,
Counsel for Petitioner.

SAM ROSENWEIN
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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IN THE

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PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the Appellate Department of the Superior Court of the State of California for the County of Santa Clara.

Petitioner prays that a writ of certiorari issue to review the judgment of the Appellate Department of the Superior Court of the State of California for the County of Santa Clara, entered in the above entitled case on July 3, 1968.

Opinions Below.

The action was tried in the Municipal Court of the San Jose-Milpitas-Alviso Judicial District, County of Santa Clara, State of California, before the Honorable Edward J. Nelson, a Judge of said court, and a jury. The judgment of conviction was affirmed by the Appellate Department of the Superior Court of the State of California for the County of Santa Clara. A written opinion was rendered by the said court on June 25, 1968

[R. 18-24][1] and is attached as Appendix A hereto. The opinion is unreported. A due and timely Petition for Rehearing, or in the Alternative, for Certification to the Court of Appeal, was denied by the said Appellate Department without opinion. Prior to trial, petitioner sought a Writ of Prohibition in the Superior Court of the State of California for the County of Santa Clara, preventing the trial in the Municipal Court from proceeding on certain constitutional and legal grounds. Relief was ultimately denied, and the opinion rendered by the Honorable George H. Barnett, a Judge of the said Superior Court, is attached hereto as Appendix B. Similar petitions for writs of prohibition, prior to trial, were denied by the District Court of Appeal and the Supreme Court of the State of California without opinion.

Jurisdiction.

The judgment of the court below [R. 6] was entered on July 3, 1968, and is attached as Appendix C hereto. A due and timely Petition for Rehearing or, in the Alternative, for Certification to the Court of Appeal [R. 8-17], was denied by the said court on July 3, 1968 [R. 7]. By order of Justice White, dated July 31, 1968, the execution and enforcement of the judgment of conviction was stayed, pending the timely filing and disposition of a Petition for Writ of Certiorari conditioned upon the posting and approval of a bail bond in the amount of $1,100.00. Said bond has been duly posted, approved and filed by order of Justice Douglas, dated September 18, 1968, the time to file this Petition for Writ of Certiorari was extended to and including November 15, 1968.

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[1]The reference "R" is to the certified record. The record is in two parts; the first part numbered 1 through 91, the second part numbered 92 through 296.

By the aforesaid denial of rehearing and transfer, the Appellate Department of the Superior Court of the State of California for the County of Santa Clara became "the highest court of a State in which a decision could be had". 28 U.S.C. §1257, 28 U.S.C.A. §1257. Cal. Const. Article VI, §11. Cal. Penal Code §1471. Cal. Rules of Court Appellate Rules, Rules 63, 66, 106-107, 190-191. *Smith v. California,* 361 U.S. 147, 148 fn 2; *Virginia Railway Company v. Mullins,* 271 U.S. 220, 222.

The jurisdiction of this court is invoked under 28 U.S.C. §1257(3), 28 U.S.C.A. §1257(3).

Questions Presented.

1. Whether California Penal Code §§311 and 311.2, as construed and applied herein by the courts below to authorize conviction of petitioner upon the ground that each of the books, *Blood Orgy, His Brother Love, Pay The Devil, The Fleshworshipers, Never On Sin Day, Gay Reunion,* and *That Kind of Girl,* is obscene and not entitled to constitutional protection, abridge the exercise of freedoms of speech and press and deprive petitioner of his liberty without due process of law, contrary to the free speech and press provisions of the First Amendment and the due process provisions of the Fourteenth Amendment.

2. Whether California Penal Code §§311 and 311.2, as construed and applied herein by the courts below to authorize conviction of petitioner, without proof that petitioner knew the contents of the books herein involved or knew that the contents were obscene, deprive petitioner of his liberty without due process of law and abridge the exercise of freedoms of speech and press,

contrary to the free speech and press provisions of the First Amendment and the due process provisions of the Fourteenth Amendment.

3. Whether California Penal Code §§311 and 311.2, as construed and applied by the courts below to broaden the statutory standards for judging obscenity to include material which has a "dishonorable, disreputable, ignominious, infamous, outrageous, scandalous, degrading" or "sick, unwholesome, unhealthy" effect upon the reader, render the state obscenity statute vague, ambiguous, uncertain and overbroad, and a prior restraint upon expression, with a resultant deprivation of petitioner's liberty without due process of law and the abridgment of the exercise of freedoms of speech and press, contrary to the free speech and press and due process provisions of the First and Fourteenth Amendments.

4. Whether California Penal Code §§311 and 311.2, as construed and applied herein by the courts below to authorize the conviction of petitioner, a retail book seller, upon the ground that the books herein, in general circulation to the public, might appeal solely to the prurient interest of "sexual deviates", constitute an unconstitutionally restrictive standard for judging obscenity, thus depriving petitioner of his liberty without due process of law and abridging the exercise of freedoms of speech and press, all contrary to the free speech and press provisions of the First Amendment and the due process provisions of the Fourteenth Amendment.

5. Whether California Penal Code §§311 and 311.2, as construed and applied herein by the courts below to authorize conviction of petitioner herein, a retail book seller, on the basis of "pandering" where such charge

was never made in the complaint nor ever proved, and where such alleged offense is specifically not recognized under state law, deprive petitioner of his liberty without due process of law and abridge the exercise of freedoms of speech and press, contrary to the free speech and press provisions of the First Amendment and the due process provisions of the Fourteenth Amendment.

6. Whether California Penal Code §§311 and 311.2, as construed and applied herein to authorize a conviction of petitioner without proof that each of the books exceeds the limits of candor, in the nation as a whole, in the depiction or representation of matters pertaining to sex or nudity, or appeals to the prurient interest of the average person, or is utterly without social importance, deprive petitioner of his liberty and property without due process of law and abridge the exercise of freedoms of speech and press, contrary to the free speech and press provisions of the First Amendment and the due process provisions of the Fourteenth Amendment.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First and Fourteenth Amendments to the Constitution of the United States and the provisions of California Penal Code, §§311 and 311.2, are set forth in Appendix D hereto.

Statement of the Case.

Petitioner, the owner of a retail book store, was charged in a sixteen-count complaint [R. 92-95] with violations of California Penal Code §311.2. Each of the counts of the complaint was in similar language. The charge was that petitioner did willfully, unlawfully, and knowingly distribute, or have in his possession with intent to distribute, alleged obscene matter, each count

specifying a particular publication. The cause came on for trial before the Honorable Edward J. Nelson, a judge of the Municipal Court of the San Jose-Milpitas-Alviso Judicial District, County of Santa Clara, State of California, and a jury. The jury returned a verdict of not guilty with respect to seven counts of the complaint; was unable to reach a verdict with respect to two other counts; and returned a verdict of guilty with respect to Count One (*Blood Orgy*); Count Four (*His Brother Love*); Count Eight (*Pay The Devil*); Count Nine (*The Fleshworshipers*); Count Fourteen (*Never On Sin Day*); Count Fifteen (*Gay Reunion*); and Count Sixteen (*That Kind of Girl*).

Except for the books introduced into evidence, the prosecution offered no evidence to establsh that the books exceeded contemporary community standards in the nation as a whole, or appealed to the prurient interest of the average person, or was utterly without social importance. A witness for the prosecution, a psychiatrist, testified solely with respect to the effect of the covers of the books on the "prurient interest of a deviate" [R. 267]. Police officers testified that they visited petitioner's bookstore and purchased the books herein. They testified that they saw a sign "No Minors", and petitioner testified that there were both interior and exterior signs limiting patronage to adults only. No minors were involved in the case herein and there was no evidence of sale to any sexual deviate [R. 266]. The front door of the establishment was open at all times during business hours as testified to by prosecution witnesses, as well as the petitioner. All material was open and in full view [R. 267]. Prosecution witnesses testified that the store principally con-

tained "sex-oriented paperbacks" and nudist magazines. The petitioner testified that he had other material for sale [R. 267].

The trial court, over objection, gave a series of instructions to the jury with respect to "pandering" [R. 149-153, 265].

The trial court instructed the jury, over objection, that the *scienter* requirement would be satisfied if it were established that petitioner was aware of "the contents of the materials" [R. 135, 265]. A request by petitioner that the trial court instruct the jury that petitioner could not be held liable unless shown beyond a reasonable doubt to have had knowledge that each of the books offered for sale was obscene was denied by the trial court [R. 173, 265].

After the jury had been deliberating for two days, the jury returned to the courtroom and requested the trial court to define the words "shameful" and "morbid". The trial court, over objection, instructed the jury that the word "shameful" meant "dishonorable, disreputable, ignominous (sic), infamous, outrageous, scandalous, degrading" and that the word "morbid" meant "sick, unwholesome, unhealthy" [R. 179, 269-270].

All of the aforesaid instructions and refusals to instruct are discussed hereafter in the Reasons for Granting the Writ.

How Federal Questions Are Presented.

Prior to the trial, the petitioner herein demurred to the complaint and moved to dismiss the said complaint upon the ground, among others, that the state obscenity statute, on its face and as construed and applied to

the books and petitioner herein, was unconstitutional, in violation of the free speech and press and due process provisions of the First and Fourteenth Amendments to the United States Constitution, as well as the similar provisions of the State Constitution [R. 96-114, 264-265]. The demurrer was overruled and the motion to dismiss denied by the trial court [R. 115, 265].

Thereafter, and prior to trial, petitioner filed a petition for a writ of prohibition in the Superior Court of the State of California in and for the County of Santa Clara, seeking to restrain the trial of the action upon similar constitutional grounds. The said petition was denied by a judge of the Superior Court on February 27, 1967. A written opinion was rendered [R. 265-266, 274]. See Appendix B attached hereto. Similar petitions for writs of prohibition were filed in the District Court of Appeal and the Supreme Court of the State of California, and both applications were denied without opinion [R. 265-266, 274-275].

Following the return of the jury verdict, petitioner moved for a new trial and in arrest of judgment, and again raised the question as to the validity of the statute as applied to the particular books involved herein [R. 256-258]. The motions for a new trial and arrest of judgment were denied [R. 288-289]. The Settled Statement on Appeal was certified by the trial court [R. 264-270] on October 9, 1967. See, California Rules of Court, *Appeals from Municipal Courts and Justice Courts in Criminal Cases,* Rules 184-185, 187. The Statement of Appeal, as settled by the parties and certified by the trial court, specifies that petitioner claimed that the state obscenity statute, on its face and as construed and applied to petitioner was unconstitutional;

that the trial court erroneously instructed the jury as aforementioned; that the trial court erroneously refused to give requested instructions as aforementioned; that the constitutional issues were raised prior to trial as aforementioned; and that petitioner objected to the further instructions given by the trial court to the jury after the jury requested a further definition of the words "shameful" and "morbid", as heretofore discussed [R. 264-270].

On appeal, petitioner again asserted the claim that the books herein involved are protected by the free speech and press provisions of the First and Fourteenth Amendments [R. 61-71]; that the statute, as construed and applied by the trial court in its instructions on *scienter,* was rendered unconstitutional and contrary to the free speech and due process provisions of the First and Fourteenth Amendments [R. 72-75]; that the statute, as construed and applied by the trial court in its instructions on "pandering" and "sexual deviates" was similarly rendered unconstitutional [R. 76-78]; and that the statute was rendered unconstitutionally vague, in violation of the due process and free speech and press provisions of the First and Fourteenth Amendments, by the trial court's definitions of "shameful" and "morbid" [R. 78-79].

The written opinion of the court below [Appendix A, R. 18-24], specifically rejects the claim that the statute, on its face and as construed and applied to the books and petitioner herein, violate the free speech and press provisions of the First and Fourteenth Amendments. On petition for rehearing [R. 8-17], all of the constitutional issues aforementioned, arising under the due process and free speech and press provisions of the

First and Fourteenth Amendments to the United States Constitution, were again presented. The petition for rehearing was denied [R. 7].

Reasons for Granting the Writ.

1. It is submitted that the court below has decided federal questions of substance in a way not in accord with applicable decisions of this Court. By the ruling of the court below, a retail book seller has been subjected to the severe sentence of one year imprisonment, a substantial fine, and three years probation. The effect of the affirmance of the judgment of conviction is the suppression of seven different books. This punishment and suppression has been imposed against the claim that the books are entitled to constitutional protection under the First and Fourteenth Amendments to the United States Constitution, and in further disregard of the contention by petitioner that the trial below arbitrarily and capriciously deprived petitioner of his liberty and property without due process of law. The state obscenity statute, as construed and applied in the proceedings herein, transgresses upon the fundamental guarantees of the First and Fourteenth Amendments.

(a) While the court below resorted to the talismanic labels of "hard-core pornography" and "obscenity," it should be observed that the opinion of the court descends to the particular and explicates precisely what these labels signify to the court. It has been held, of course, that a "state cannot foreclose the exercise of constitutional rights by mere labels" (*N.A.A.C.P. v. Button,* 371 U.S. 415, 429), and that obscenity "can claim no talismanic immunity from constitutional limitations" (*New York Times Company v. Sullivan,* 376 U.S. 254, 269). In this case, however,

the court below has left no room for conjecture as to the standards which the court employed in judging the alleged obscenity of the books involved herein. The standards enunciated fail, it is submitted, to meet the demands of the Constitution as embodied in the free speech and press and due process provisions of the fundamental law.

Thus, as the opinion of the court below states, the writings are condemned because of their alleged appeal to the "emotionally unstable and impressionable element in our society" [R. 21]. See, *Roth v. United States* (*Alberts v. California*), 354 U.S. 476, 489, rejecting the "unconstitutionally restrictive" *Hicklin* test. It is held "that the purpose of their publication and dissemination is to create an ever expanding and profitable market" [R. 22]. See, *Smith v. California,* 361 U.S. 147, 150; *New York Times Company v. Sullivan,* 376 U.S. 254, 266. The court below speaks of "the inalienable right and duty to protect its impressionable offspring and its sexually psychotic fringes from the pernicious spread of such unbridled license" [R. 22]. See, *Butler v. Michigan,* 352 U.S. 380; *Roth v. United States* (*Alberts v. California*), 354 U.S. 476, 489. Reference is made to "the acknowledged right of society to protect itself against drug abuse or any other social aberration" [R. 22]. See, *Smith v. California,* 361 U.S. 147, 152-154; *Marcus v. Search Warrants of Property,* 367 U.S. 717, 730-731. The court states that the "free speech and press provisions" are "subservient to" the general welfare provisions of the Preamble to the Constitution [R. 22]. See, *Kingsley International Pictures Corporation v. Regents,* 360 U.S. 684, 688-689; *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 636-637, 638-641.

The opinion of the court condemns an industry "composed of authors, publishers, purveyors and defenders of infectious filth whose reward is economic gain" [R. 23], and the court below declares that within the limitations of its authority the court will not permit the "flood" of alleged filthy literature to "be increased by so much as one prurient drop" [R. 23]. Moreover, while the court below acknowledged a duty to exercise an independent constitutional judgment, nevertheless, it declined to make any meaningful judgment but concededly ignored and refused to consider comparable books and other writings which have been held to be constitutionally protected by the decisions of this Court and other courts in federal and state jurisdictions [R. 19]. The court below described such material as "an appallingly extensive bibliography of publications questioned for obscenity which are still at large upon the contemporary American scene" [R. 19]. See, *Manual Enterprises, Inc. v. Day,* 370 U.S. 478, 489-490; *Jacobellis v. Ohio,* 378 U.S. 184, 195-196, 197-198.

The court below has enunciated standards for judging obscenity which clearly fail to safeguard the freedoms guaranteed by the First and Fourteenth Amendments. Such a construction of the state obscenity statute is not only contrary to the decisions of this Court but, if permitted to stand, would create a chilling effect upon all freedom of expression and result in the denial of the community to access to constitutionally protected material.

(b) Measured by constitutional standards, the books herein are, it is submitted, entitled to constitutional protection. The writings are comparable to the many publications which have been held to be not obscene

and protected by the guarantees of the First Amendment. Depiction of sex in the books herein is well within contemporary community standards. The writings do not appeal to a morbid or shameful interest in sex and they cannot be deemed to be utterly without social value. Each of the books has a plot, characters, and characterizations. The writings reflect the attitudes and behavior of contemporary society and contain moralistic overtones. The books are devoid of the so-called four-letter Anglo-Saxon words.

The right of an adult reading public to access to these books and to a broad area of comparable material appears plain in light of the guarantees of the First Amendment. This case does not involve a statute reflecting a "specific and limited state concern for juveniles", nor does it involve any "assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it", nor was there evidence of the sort of "pandering" which the Court found significant in *Ginzburg v. United States,* 383 U.S. 463. These books are clearly not "hard-core pornography". *Ginzburg v. United States,* 383 U.S. 463, 499 fn. 3; *Redrup v. New York,* 386 U.S. 767, 770-771.

The book *Blood Orgy* (Count One) is a murder mystery novel about a physician and his family. The doctor and his wife are modern, sophisticated people with little interest in the upbringing of their children. One night while they are away, their seventeen year old babysitter is murdered in their home. To shelter their children from the horror of the situation, the physician and his wife move in with friends. This time, a maid in the friends' home is murdered in a

manner similar to the death of the babysitter. Suspicion falls upon the physician, but the suspicion proves unfounded when the physician himself is killed and it is discovered that his own son is the guilty one. The personality traits of the son had been influenced by his observations of the conduct of his elders and he was not mature enough to exercise control. The book directs attention to the dangers of the development of a cruel and violent personality and the need to prevent such development by adult example. Parents must learn that they play an important role in creating social attitudes in their children. The book is also a detective story which extolls the police officer who unravels the mystery and the aid which he gives to a woman who has led a promiscuous life and whom he ultimately marries.

In *His Brother Love* (Count Four), the principal protagonist, Brad Stewart, a business consultant, is given the assignment of reorganizing a dress design company which is in financial trouble. A bitter rivalry exists between two leading designers. Each has designed a new line of spring fashions, but one insists that the other's creations are unflattering and reflect a homosexual's underlying hostility toward women generally. It is Stewart who must make the decision as to which line will sell successfully and save the company from financial disaster. As Stewart moves in the inner circle of homosexuals, a group which he ultimately rejects, he becomes aware that many of these persons do make significant contributions in the fields of art, politics, law, literature, music, drama and education. Thus, Stewart's final decision is the suggestion of a compromise to both designers, asking them to join

their talents together to produce a new line of clothes which will employ the best elements of their individual creative talents.

In *Pay The Devil* (Count Eight), twenty-one year old Matt Colby, deserted by his parents, raised by an aunt, and now on his own, is trying to make ends meet by working as a grocery store delivery boy; but he dreams of being rich some day. An attractive young man, he finds himself the sometimes willing, sometimes unwilling, victim of the advances of the daughter of his employer and women on his delivery route. The young man grasps at an opportunity to make large sums of money by becoming involved with a gangster syndicate. He discovers that two of the members of the syndicate are withholding money from the leader and mistakenly believes that divulging this fact to the leader will give him a stronger foothold in the organization. In fact, the leader does away with both the unfaithful followers and the informer, and thus Matt Colby has paid the Devil with his life.

In *The Flesh Worshipers* (Count Nine), a group of seven persons are thrown together in the jungles of Bolivia as a result of a plane crash. A deserted village, with its thatched huts and erotic symbols, appears to have been once inhabited by a totem-worshiping people. Lady Adelle Crandell, a dominating, cruel woman, is strongly affected by the jungle atmosphere and determines to compel the others to engage in uninhibited primitive rites, accomplishing this result by subjecting them to the use of aphrodisiacs without their knowledge. This plan is, however, discovered, and before the group begins its journey back to civilization, Lady Crandell's life ends violently. The book exemplifies the dangers

which good people may encounter when they lose self-control, willingly or unwillingly, over their lives and actions, and fail to canalize and maintain a balance between their basic instincts and the demands of an ordered society.

In *Never On Sin Day* (Count Fourteen), Don Bradford, a young man from Iowa, goes to Los Angeles to study animal husbandry in college. He learns that his dormitory roommate, Ronan, is a homosexual, and [redacted] spite of Don's overwhelming feeling of guilt and a deepening love for Chris, an attractive coed, he cannot resist the temptation of a homosexual relationship with Ronan. This leads to relationships with other men and an offer to model for nude photographs which become increasingly distasteful to Don. Through it all, Chris, who is aware of the situation, gives Don her love and understanding in the hope that he will eventually choose a life with her—which he does. This story presents a sensitive approach to the problem of homosexuality and the author demonstrates considerable insight and understanding of this social area.

In *Gay Reunion* (Count Fifteen), the only descriptions of sex relations are either heterosexual or Lesbian. The heroine, while employed at a hotel where the events occur, meets an attorney named Harvey Jamieson who is at first astonished at her way of life, then joins in with it. Eventually, however, they are married and the life led in the past is abandoned. This book is similar to, and far less candid than, many novels dealing with Lesbianism which are widely sold and generally accepted in the nation as a whole.

In *That Kind of Girl* (Count Sixteen), Anne, recently divorced and disillusioned by her discovery that

her husband was a homosexual, leaves New York to seek the quiet of a New England seashore village. Anne stays at an inn in the village and develops a friendship with the owner, Sondra. The story emphasizes the genuine fondness of the two women for each other and the development of a Lesbian relationship between them. However, Anne eventually meets Harlow Cotsworth, a member of a wealthy family, and their meeting leads to a love affair. The story deals with an attempt on Anne's life and a plot to get the inn away from Sondra. The plot, however, is discovered and foiled. Sondra ends up with the inn intact, and Anne and Harlow plan for their future together.

(c) The decisions of this Court and other courts, in the federal as well as state jurisdictions, have emphasized that sex and obscenity are not synonymous; that obscenity is not a matter of taste, nor of good or bad literature, nor good or bad art; that the constitutional protection exists for books and other material which are entertaining or informing. Books may not be suppressed because they are deemed sacrilegious or immoral or harmful or non-educational or non-amusing. *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495; *Gelling v. Texas,* 343 U.S. 960; *Superior Films, Inc. v. Department of Education of Ohio (Commercial Pictures Corp. v. Regents of New York)*, 346 U.S. 587; *Holmby Productions, Inc. v. Vaughn,* 350 U.S. 870. The Constitution protects expression without regard "to the truth, popularity, or social utility of the ideas and beliefs which are offered". *N.A.A.C.P. v. Button,* 371 U.S. 415, 445.

The unfettered right of adults to access to a wide variety of books and other media of communication

has been affirmed by the courts. It has been recognized that in a pluralistic society guarantees of the free speech and press provisions of the First Amendment afford the broadest freedom for all segments of the adult population; that the right to read, and the right to know, enjoy the most extensive protection; and that limitations upon these fundamental rights are extremely narrow. A book may not be suppressed unless it is absolutely worthless; unless it goes substantially beyond contemporary community standards; and unless it appeals to a shameful or morbid interest in sex. These independent elements must coalesce and must be established without weighing one element against the other before suppression can be justified. *Memoirs v. Massachusetts,* 383 U.S. 413.

Moreover, it has been repeatedly held that material can no longer be found to be obscene today merely because the material deals with themes or ideas which are not conventional or shared by a majority. Thus, the fact that the dominant theme of a book deals with some aspect of sex, such as Lesbianism, homosexuality, prostitution, adultery, fornication, flagellation, masochism, cunnilingus, fellatio, or other sexual behavior, is not in itself sufficient ground for denying such material the constitutional protection of the First Amendment. See, *Kingsley International Pictures Corp. v. Regents,* 360 U.S. 684.

In the light of the foregoing, the books herein involved are in all respects comparable to the multifold writings which have been held to be entitled to constitutional protection. Thus, in *Redrup v. New York,* 386 U.S. 767, 770, distribution of the books *Lust Pool* and *Shame Agent* was held "protected by the First

and Fourteenth Amendments from governmental suppression, whether criminal or civil, *in personam* or *in rem*". The books were held entitled to constitutional protection although the writings dealt candidly and explicitly with such themes as heterosexual intercourse, sadism, intercourse under the influence of drugs, cunnilingus, rape, fellatio, orgy and Lesbianism.

In *Aday v. United States,* 388 U.S. 447, the book involved was a writing entitled *Sex Life of a Cop.* The Court of Appeals, in describing the book, stated, "Without palliating interruption, the story moves quickly from one sexual enterprise to another. So numerous are these events that even the practiced skill of the author runs out of fresh imagery and dully repeats his supply of leering adjectives . . . We cannot believe that the First Amendment's great guarantee of freedom of expression can be elasticized to embrace *Sex Life of a Cop* . . . May we then, exercising the common sense which we like to think is a mark of today's federal judges, say that we know hard-core pornography when we see it and *Sex Life of a Cop* is just that". 357 F. 2d 855, 858 (6 Cir. 1966). Based upon the decision in *Redrup,* this Court reversed.

In *Books, Inc. v. United States,* 388 U.S. 449, the book involved was *Lust Job.* The lower court described the book as "a tale exclusively devoted to the sexual adventures and its principal characters. Adulteries, seductions, and orgies are the only events of importance. The contacts described include not only sexual intercourse but sodomy and other perversions". 358 F. 2d 935, 966 (1 Cir. 1966). The Court reversed the judgment of conviction based on *Redrup.*

In *Quantity of Copies of Books v. Kansas,* 388 U.S. 452, this Court upheld a declaratory judgment, contrary to the decision of the Kansas Supreme Court (197 Kan. 306, 416 P. 2d 703, 1966), holding that the following books, in the light of the *Redrup* decision, were not obscene and were entitled to constitutional protection: *Sin Hooked, Bayou Sinners, Lust Hungry, Shame Shop, Fleshpot, Sinners Seance, Passion Priestess, Penthouse Pagans, Shame Market, Sin Warden* and *Flesh Avenger.*

In *Corinth Publications, Inc. v. Wesberry,* 388 U.S. 448, the book involved was *Sin Whisper,* which had been described in the state court as obscene, containing allegedly lengthy, detailed, and vivid accounts of normal and abnormal sexual relations. 221 Ga. 704, 146 S.E. 2d 764 (1966). The Court reversed the state declaratory judgment of obscenity.

In *Keney v. New York,* 388 U.S. 440, a judgment of conviction under the state obscenity statute was reversed, based upon the decision in *Redrup.* The books involved were entitled *Sin Servant, Lust School* and *Lust Web.*

In *Friedman v. New York,* 388 U.S. 441, the state judgment of conviction was reversed on the basis of the ruling in *Redrup.* Involved were the publications entitled *Bondage Boarding School, English Spanking School, Bound and Spanked, Sweeter Gwen, Travelling Saleslady Gets Spanked, Bound to Please, Bizarre Summer Rivalry, Heat Wave,* and *Escape Into Bondage, Book No. 2,* which had been described by the state court as obscene, sadistic and masochistic.

In *Mazes v. Ohio,* 388 U.S. 453, the Ohio judgment was reversed, based on the decision in *Redrup.*

The book involved was *Orgy Club.* See, 3 Ohio App. 2d 90, 209 N.E. 2d 496; 7 Ohio St. 2d 136, 218 N.E. 2d 725 (1966).

In *Shepard v. New York,* 388 U.S. 444, the Court reversed the judgment of conviction, based on the decision in *Redrup.* Involved were sets of photogaphs and the following books: *Promenade Bondage, Spanking Nurses, Spanking Sisters,* and *Bondage,* alleged to be obscene, in violation of the New York obscenity law.

In *Avonsino v. New York,* 388 U.S. 446, the publication involved was *Promenade Bondage Vol. 4,* which was described by the state court as obscene, sadistic and masochistic. Reversal of the judgment of conviction was based upon the decision in *Redrup.* See also, *Grove Press, Inc. v. Gerstein,* 378 U.S. 577, rvsg. 156 So. 2d 537 (1963) (*Tropic of Cancer*); *Tralins v. Gerstein,* 378 U.S. 576, rvsg. 151 So. 2d 19 (1963) (*Pleasure Was My Business*); *Memoirs v. Massachusetts,* 383 U.S. 413, rvsg. 349 Mass. 69, 206 N.E. 2d 403 (1965) (*Fanny Hill*).

(d) Lower federal courts and state courts, applying the aforesaid constitutional standards and criteria for judging obscenity in the light of the guarantees of the First Amendment and the decisions of this Court, have also held a large variety of books dealing with sex to be not obscene.

In *Grant and Wissman v. United States,* 380 F. 2d 748 (9 Cir. 1967), the judgments of conviction under an obscenity indictment were reversed and the indictments directed to be dismissed. The books involved were entitled *Swish! Bottom!, Screaming Flesh,* and *The Holdout,* described by the Court of Appeals "as

obsessed with sex" and "junk". The court held that the books were, nevertheless, entitled to constitutional protection and that they were "obviously about the same as dealt with in Redrup v. New York" and the other decisions aforementioned. 380 F. 2d at 748.

In *Luros v. United States,* 389 F. 2d 200 (8 Cir. 1968), the court found the following books to be entitled to constitutional protection: *Lesbian Sin Song, Two Women in Love, Pleasure House, Lesbian Alley, The Three-Way Apartment,* and *The Affairs of Gloria.* In holding the books to be not obscene, the court stated:

> "It is far better there be a tight rein on authoritarian suppression, notwithstanding a conflict with some individuals' tastes or customary limits of candor, than that we live in a stifled community of self-censorship where men must feel apprehension over expression of an unpopular idea or theme." 389 F. 2d at 206.

See also, *Haldeman v. United States,* 340 F. 2d 59 (10 Cir. 1965) (the following booklets held not obscene: "Revelations of a Sexologist", "Questions and Answers on the Sex Life and Sexual Problems of Homosexuals, of Both Sexes", "Questions and Answers Involving Sexual Ethics and Sexual Esthetics", "Questions and Answers About Cunnilingus", "Questions and Answers on Sex and the American Attitude", "Questions and Answers on Undinism", "Questions and Answers About Oragenital Contacts" and "Questions and Answers on Sex Physique Disparity"); *Grove Press, Inc. v. Christenberry,* 276 F. 2d 433 (2 Cir. 1960), aff'g 175 F. Supp. 488 (D.C. N.Y. 1959) (*Lady Chatterley's Lover* not obscene); *People v. Kimmel,* 35 Ill. 2d 244, 220 N.E. 2d 203 (1966) (*Sex*

Addicts not obscene); *Chicago v. Universal Publishing and Distributing Corp.*, 34 Ill. 2d 250, 215 N.E. 2d 251 (1966) (*Instant Love, Marriage Club, Love Hostess, The Shame of Jenny, High-School Scandal, Her Young Lover,* and *Cheater's Paradise* held entitled to constitutional protection); *State v. Onorato,* 216 Atl. 2d 859, 3 Conn. Cir. 438 (1965) (*The Sex Diary of Gerard Sorme* not obscene); *Attorney General v. A Book Named "Naked Lunch",* 351 Mass. 298, 218 N.E. 2d 571 (1966) (*Naked Lunch* not obscene); *Commonwealth v. Dell Publications, Inc.,* 427 Pa. 189, 233 A. 2d 840 (1967) (*Candy* not obscene).

(e) Finally, the books herein should be considered, it is submitted, in the context of the attitudes and behavior prevalent in contemporary society. "We are living in a much more permissive society, and we are much more vocal about sex." 376 Annals of the American Academy of Political and Social Science, March 1968, p. 16. See also, Kerr, *The Theater of Say It! Show It! What Is It?,* New York Times Magazine, Sept. 1, 1968, p. 10; Gilman, *Pornography, Obscenity, Sexual Expression,* New York Times Magazine, Sept. 8, 1968, p. 36.

There is considerably more openness about sex. Advertisements in leading newspapers throughout the country are much more candid than they used to be. Motion pictures have become more obvious. The theater has been more open about sex and its various ramifications, and four-letter words are becoming customary fare in both books and the visual arts. As indicative of the broad tolerance of books dealing with sex, in the nation as a whole, there should be noted such writings as *Sexus* and *Tropic of Capricorn* by

Henry Miller, *The Story of O* by Pauline Reage, and *My Secret Life,* which contains the famous memoirs of an anonymous gentlemen of Victorian England, originally comprising eleven volumes, which was published in its entirety in two volumes by Grove Press and is distributed and sold throughout the nation, and which book describes every form of Lesbianism, pederasty, flagellomania, sodomy and incest.

Moreover, the suppression of the books involved herein, under the standards enunciated by the court below, reflects a revival of censorship which the provisions of the Constitution, as interpreted by the courts, are intended to prevent. In various portions of the world, the struggles today against censorship have been concomitant with the struggles to obtain and maintain a free society. It is becoming plain that censorial repression is a danger to the values of a free society and that democracy cannot survive when such repression exists. It is also becoming obvious that a program of censorship which is supposedly directed solely at "bad books" or "bad ideas" ultimately ends up as limitless repression. Opinions which are thought to be potentially dangerous to the moral code or the artistic code soon turn out to be dangerous to "the general welfare" or the "established order". The democratic form of government differs in its fundamental concepts from others founded on authoritarian principles. Much of our strength as a nation lies in the basic rights and protection enunciated in the First Amendment relating to freedom of speech and press. The judgment of conviction here, if permitted to stand, would erode that strength.

2. The record is barren of any evidence to establish that petitioner knew the contents of the books or that the contents were obscene, as alleged in the complaint. The trial court instructed the jury that it was only necessary to establish that petitioner was "aware of the contents of the materials", but that it was "not necessary to show that he knew that it was obscene". The trial court stated to the jury that if the jury found that the defendant had knowledge of the contents of the material, "then he had knowledge within the meaning of the law no matter what he may have thought concerning the alleged obscenity of the materials" [R. 135]. A request by the petitioner to the trial court to instruct the jury that a person could not be held criminally liable under the statute unless it be established that he had knowledge that the material offered for sale was obscene was denied by the trial court [R. 173].[2]

In *Roth-Alberts,* the constitutional validity of the obscenity statutes therein involved rested in large part upon the ruling by the Court that the statutes were not intended to apply to book sellers of writings dealing with sex, but only to those persons who had knowledge that the particular material was obscene. In

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[2]In 1967, the Attorney General of the State of California suggested an amendment to California Penal Code §311(e) to water down the strict *scienter* requirement of the law in a manner similar to the trial court's instructions herein. The Attorney General stated, "Our present statute (311.2) has been interpreted by the courts to require not merely knowledge *of the contents* but knowledge that the contents *are obscene*". A Report to the California Legislature on Obscenity: The Law and the Nature of the Business (April 6, 1967) 17 (author's emphasis). The Attorney General's suggested amendment has not been accepted by the legislature. See, *People v. Noroff,* 67 A.C. 814, 433 P. 2d 479, 63 Cal. Rptr. 575, 576 fn. 3 (1967).

Smith v. California, 361 U.S. 147, this Court held that the strict liability aspect of the California ordinance resulted in serious restrictions on the circulation of books which were not obscene, "by penalizing book sellers, even though they had not the slightest notice of the character of the books they sold". 361 U.S. at 152. The tendency of the California ordinance was to erode fundamental freedoms of speech and press by holding a book seller criminally liable for possessing an obscene book, "wholly apart from any *scienter* on his part regarding the book's obscenity". 361 U.S. at 160.

In *Mishkin v. New York,* 383 U.S. 502, 511, the Court stated: "The Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity." In approving the authoritative interpretation placed upon the New York obscenity statute by the highest court of the State with respect to the "stringent scienter requirement" and the "vital element of scienter" (383 U.S. at 507, n. 5, 510), the Court specifically noted that a parenthetical reference in the Court of Appeals' opinion to "knowledge of the contents of the books" was not to be read as a "modification of this definition of scienter" (383 U.S. at 510, n. 9).

To permit the conviction of an accused in an obscenity prosecution solely on the basis of proof of knowledge of contents is to attempt indirectly to impose the absolute criminal liability which was condemned by the Court in *Smith v. California.* Sex is not synonymous with obscenity, and knowledge of the contents of a writing dealing with sex is not in itself the equivalent of knowledge of the alleged obscenity of

the writing. Mere proof that a publisher or distributor knows the contents of *Tropic of Cancer, Lady Chatterley's Lover, Fanny Hill, Pleasure Is My Business, Lust Pool, Shame Agent, Sin Hooked, Lust Job, Sex Life of a Cop,* "Solis", etc., etc., in no way establishes, it is submitted, that such publisher or distributor knows that the books or magazines are obscene. The decisions of this Court and the various federal and state courts heretofore discussed make this abundantly clear.

Moreover, to instruct a jury in an obscenity prosecution, as the trial court did below, that one who is shown to have had knowledge of the contents of a book is conclusively presumed to know that the book is obscene appears highly arbitrary, capricious, and irrational. Members of this Court, as well as other courts, have stressed the diversity of views among the judiciary with respect to the appropriate standards for judging obscenity, and the difficulty in identifying the elements of the offense as guidelines for court or jury in making an appropriate determination. See, *Redrup v. New York,* 386 U.S. 767, 770-771; *Ginzburg v. United States,* 383 U.S. 463, 476-481 (Dissenting opinion of Justice Black); *Jacobs v. New York,* 388 U.S. 431, 434 (Dissenting opinion of Chief Justice Warren); *Ginsberg v. New York,* 390 U.S. 629, 88 S. Ct. 1274; and *Interstate Circuit, Inc. v. City of Dallas,* 390 U.S. 676, 88 S. Ct. 1298, 1313-1315 (Concurring and dissenting opinion of Justice Harlan). If the problem of what constitutes obscenity is a problem "which has become increasingly muddled and difficult for the federal and state courts and legislatures to understand" (388 U.S. at 434), and if "anyone who undertakes to examine the Court's decisions since *Roth* which have

held particular material obscene or not obscene would find himself in utter bewilderment" (88 S. Ct. at 1315), then, it is submitted, it is manifestly unfair to punish a retail book seller merely upon a finding of alleged knowledge of the contents of the writing. *New York Times Co. v. Sullivan,* 387 U.S. 254; *Garrison v. Louisiana,* 379 U.S. 64; *Time, Inc. v. James J. Hill,* 385 U.S. 374.

The construction and application of the state obscenity statute which resulted in the elimination of the *scienter* requirement in the prosecution herein constitute substantial restriction on the exercise of freedoms of speech and press. Such a procedural device as was invoked in the case herein to require only proof of knowledge of contents results in the ultimate sense in self-imposed restrictions of free expression by all those engaged in the circulation of the press. The aforesaid statute, as thus construed, is capable of many unconstitutional applications which threaten those who validly exercise their rights of free expression with criminal prosecution. Such a construction of the statute renders the statute impermissibly vague, with a potential inhibiting effect on speech, and authorizes the indiscriminate classification of innocent and guiltless behavior with knowing activity and unlawful purpose, all in clear violation of the protective provisions of the First Amendment.

Moreover, there is no evidence in the record that this petitioner even knew the contents of the particular books involved in these proceedings. The fact that a retail bookseller has other books and magazines in his establishment dealing with sex and nudity in no way establishes, it is submitted, that a particular book

charged in a complaint is obscene or that the retailer knew it to be obscene. Sex is not obscenity, and as Justice Harlan stated in *Roth v. United States,* 354 U.S. 476, 497: "Every communication has an individuality and 'value' of its own." Books do not become obscene by association, and guilty knowledge cannot be inferred from lawful possession. "When the State undertakes to restrain unlawful advocacy it must provide procedures which are adequate to safeguard against infringement of constitutionally protected rights—rights which we value most highly and which are essential to the workings of a free society." *Speiser v. Randall,* 357 U.S. 513, 521. See also, *Thompson v. City of Louisville,* 362 U.S. 199; *Garner v. Louisiana,* 368 U.S. 157.[3]

3. The construction and application of the statute by the courts below render the provisions of the statute patently vague, ambiguous, and uncertain, as well as overbroad. California Penal Code §311(a) requires that the predominant appeal of the material, taken as a whole, be to a prurient interest, *i.e.,* "shameful or morbid interest" in nudity, sex, or excretion. The jury, after having deliberated for two days [R. 269], returned to the courtroom and requested of the trial court a definition of the words "shameful" and "morbid". Over objection of counsel, the trial court instructed the jury that the word "shameful" meant "dishonorable disreputable, ignominous (sic), infamous,

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[3]The initial grant of certiorari in *Redrup* and *Austin* limited review to the issue of *scienter,* 384 U.S. 916, but the important *scienter* question was left undecided when the Court held the books involved to be not obscene. *Redrup v. New York,* 386 U.S. 767. The *scienter* issue is again before this Court in *Stanley v. Georgia,* Oct. Term 1968, No. 293, Jurisd. noted Oct. 14, 1968, 37 L.W. 3133.

outrageous, scandalous, degrading"; and that the word "morbid" meant "sick, unwholesome, unhealthy" [R. 179, 269].

The statute as thus construed sweeps within its ambit material ordinarily entitled to constitutional protection. It would punish and suppress the sale and distribution of books upon the finding of a judge or jury that the effect of the book upon the average reader would be "outrageous" or "scandalous" or "unwholesome". Under tests such as these, the only result, as in the case herein, is the suppression of material which is deemed subjectively objectionable by law enforcement officers or the trier of the facts. The end result is censorship in its most virulent form.

It has been held, however, that "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms". *N.A.A.C.P. v. Alabama,* 377 U.S. 288, 307. In addition, "when First Amendment rights are involved, we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer". *Ashton v. Kentucky,* 384 U.S. 195, 200, fn. 1, 2. See also, *Keyishian v. Board of Regents,* 385 U.S. 589; *Thornhill v. Alabama,* 310 U.S. 88; *Winters v. New York,* 333 U.S. 507; *Baggett v. Bullitt,* 377 U.S. 360; *Dombrowski v. Pfister,* 380 U.S. 479; *Terminiello v. Chicago,* 337 U.S. 1; *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495.

4. The trial court instructed the jury that they might find that some of the books involved in the case depict deviant sexual practices which "do not appeal to

the prurient interest of the average person, that instead of stimulating the erotic, they disgust and sicken". However, stated the trial court to the jury, if the jury found beyond a reasonable doubt that such material "appeals to the prurient interest of a clearly defined deviant sexual group, then the prurient appeal requirement included in the test for obscenity as I have stated to you is satisfied" [R. 152]. In short, the state obscenity statute was construed and applied as authorizing the conviction of a retail book seller who distributes or sells books for general circulation if the theme of such books deals with homosexuality or Lesbianism and might appeal to the prurient interest of the average homosexual or average Lesbian. Conviction would be authorized under the instructions of the court even if such books in general circulation did not appeal to the prurient interest of the average person.

Although the complaint made no charge that petitioner in any way sold or distributed the books with intent to appeal to the prurient interest of a sexual deviate, and although the record was barren of any proof that petitioner in any manner designed or diseminated the material to a clearly defined deviant sexual group, nevertheless the statute was construed as authorizing conviction on such theory, even though the books were plainly sold to the public at large. Indeed, this was the principal reliance of the prosecution at the trial, for the sole witness relied upon by the prosecution to testifify concerning the books merely testified that the covers of the books would appeal to the "prurient interest of a deviate" [R. 266-267].

The construction of the statute by the courts below is plainly unconstitutionally restrictive because it amounts essentially to the invocation of the "most-susceptible-person facet of the *Hicklin* test". *Mishkin v. New York,* 383 U.S. 502, 509. See also, *Butler v. Michigan,* 352 U.S. 380. Without any charge made; without any proof that this petitioner, a retail book seller, in any way designed or disseminated the books to a deviant sexual group; without any proof that these books were specifically conceived or marketed for such groups, petitioner has simply been convicted upon the theory that books in circulation generally among the people may be suppressed whenever it can be shown that such books may have an effect upon some highly susceptible person. The only result of such construction of the law is to reduce the reading of the general public to that which is suitable for a homosexual, Lesbian, or other sexual deviate. Clearly, the First Amendment forbids such result. Morever, the covers on the books herein are not essentially different from, and are comparable to, thousands of covers on paperbacks throughout the nation, and to permit all such books to be suppressed on the theory that they may appeal to the prurient interest of some sexual deviate is to authorize wholesale suppression of expression.

Moreover, it should be noted that homosexuality and Lesbianism are facts of life well-known to the scientist as well as the novelist. They constitute problems of universal significance. They have existed in every period of civilization among every people. Clinical case histories and realistic details in all of these works are now made available to the general public, sometimes in paperback covers. See, for example, Kinsey, *Sexual*

Behavior in the Human Female (Philadelphia, 1953); Cory, Donald W., *The Homosexual in America,* Paperback Library (New York, 1963). Lesbianism and homosexuality have been the principal themes of literally hundreds of books in general circulation throughout the nation as a whole. A number of such books dealing with sex and sex variants have been made into motion pictures as, for example, "Cat on a Hot Tin Roof", "Tea and Sympathy", and "Who's Afraid of Virginia Woolf?" To construe a general state obscenity statute as authorizing the conviction of a retail book seller for selling books dealing with homosexuality or Lesbianism merely because such books may appeal to the prurient interest of a sexual deviate is to deprive the entire community to access to constitutionally protected material. See, *Redrup v. New York,* 386 U.S. 767, and the subsequent decisions based upon *Redrup* aforementioned.

5. Although no charge of "pandering" was ever made in the complaint herein, and although no proof appears in the record to support such a charge against this retail book seller, the petitioner herein, nevertheless the trial court instructed the jury that the petitioner could be convicted on the basis of "pandering" as if the petitioner was in the same position as the publisher in *Ginzburg v. United States,* 383 U.S. 463.

Thus, the trial court instructed the jury that pandering may be defined as "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of customers" [R. 149]. The jury was instructed that if the jury found that the petitioner's "sole emphasis was on the sexually provocative aspects of his publications, that fact may be de-

cisive in the determination of obscenity" [R. 150]. Finally, the court instructed the jury "if you find from the evidence that the defendant pandered, as I have previously defined pandering to you, then such evidence may support the determination that the materials in question are obscene, even though in other contexts the material could escape such condemnation. Thus, evidence of pandering may be probative with respect to the nature of the material in question and thus be relevant in determining the ultimate question of obscenity" [R. 151].

The petitioner was not only convicted on a charge never made and a charge never proved (*DeJonge v. Oregon,* 299 U.S. 353; *Cole v. Arkansas,* 333 U.S. 196; *Thompson v. City of Louisville,* 362 U.S. 199), but was convicted for an alleged offense which the highest court of the state has held is not a crime. In *People v. Noroff,* 67 A.C. 814, 433 P. 2d 479, 63 Cal. Rptr. 575 (1967) the California Supreme Court stated: "We cannot accept the People's argument, advanced for the first time on appeal, that the trial court should have permitted the prosecution to go to the jury with evidence bearing upon the defendant's 'pandering' of the magazine in question. First, the indictment did not charge the defendants with pandering; second, the State Legislature has created no such crime". 63 Cal. Rptr. at 576.

Thus, in the case herein, despite the fact that the books were entitled to constitutional protection, the

jury was permitted to find the books to be obscene if it allegedly found that petitioner was guilty of "pandering". Conviction under such circumstances is the sheerest denial of due process in its most elemental sense, as well as a plain disregard of the free speech and press guarantees of the First Amendment.

6. In essence, the prosecution in the case herein never assumed the burden of proving that each of the books herein substantially exceeded contemporary community standards, or appealed to the prurient interest of the average person, or was utterly without social importance. The essential elements of the alleged obscenity were not established. See, *Jacobellis v. Ohio,* 378 U.S. 184; *Memoirs v. Massachusetts,* 383 U.S. 413.

It has been held, however, by this Court that where issues of speech and press are involved, due process requires that the State bear the burden of persuasion to show that the challenged speech is not protected by the guarantees of the First Amendment. *Freedman v. Maryland,* 380 U.S. 51; *Speiser v. Randall,* 357 U.S. 513. Where there is no evidence before a jury to support the essential elements which constitute the basis of the prosecution, the verdict can only be based upon the subjective reflections, or tastes, or moral outlook of individual jurors. Such a verdict, so arrived at, is clearly contrary to due process concepts and can inevitably lead only to broad censorial suppression. See, *United States v. Klaw,* 350 F. 2d 155, 167-168 (2 Cir. 1965);

Luros v. United States, 389 F. 2d 200, 205 (8 Cir. 1968); *Dunn v. Maryland State Board of Censors,* 240 Md. 249, 255, 213 A. 2d 751 (1965); *Hudson v. United States,* 234 A. 2d 903, 906 (D.C. Ct. of App. 1967).

Conclusion.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

STANLEY FLEISHMAN,
Counsel for Petitioner.

SAM ROSENWEIN.
Of Counsel.

APPENDIX A.

Opinion of the Appellate Department of the Superior Court for the County of Santa Clara.

In the Superior Court of the State of California, in and for the County of Santa Clara, Appellate Division.

People of the State of California, Plaintiff and Respondent, vs. Robert S. Daly, Defendant and Appellant. Appellate No. 161.

Filed: June 26, 1968.

Appellant Daly, defendant herein, was the proprietor of a book store open to the general public of Santa Clara County. The store specialized in the sale of nudist magazines and photographs, together with sex-oriented paperback publications. The atmosphere of the shop, through both decor and content, brazenly emphasized sex and seemingly every conceivable sexual aberration. The District Attorney's investigators selected from the stock on display 16 paperback volumes. Based upon these purchases and pursuant to P.C. 311.2, defendant was charged in a 16-count misdemeanor complaint with the unlawful distribution or possession of obscene matter, each count relating to a particular book. Following a plea of not-guilty, a trial of six weeks duration ensued before a jury. Of the 16 counts, verdicts of guilty were returned in seven, which were based on the books *Blood Orgy, His Brother Love, Pay the Devil, The Flesh Worshipers, Never on Sinday, Gay Reunion,* and *That Kind of Girl.* It is from the resulting judgments that this appeal has been taken.

Appellant has argued that these convictions must be set aside on Constitutional grounds. He claims the protection of the free speech and press provisions of the First and Fourteenth Amendments to the United States

Constitution and Article I, Section 13 of the California Constitution, in that these books, he contends, are not obscene, but represent merely the exercise of protected expression.

In cases of this nature involving statutory interpretation as related to the Constitutional issue of free speech, there is no question but that a reviewing court must make an examination of the whole record, including a review of the challenged material. In so doing, it must reach an independent judgment and determine whether a particular book, and hence the defendant, is within or without the protective cloak of the Constitution. *Zeitlin v. Arnebergh*, 59 C2d 901 (1963).

For persuasion in his favor, appellant's briefs have deluged this Court with cited cases from throughout the nation wherein courts have granted Constitutional protection for books having titles as suggestive and inflamatory as those in question. Appellant's efforts in that behalf have seemingly created an appallingly extensive bibliography of publications questioned for obscenity which are still at large upon the contemporary American scene.

In effect, appellant proposes that this Court should exercise its judgment by the simple comparative process of reviewing the books here in question and concluding that they are no worse than others that have been granted protection by some other court elsewhere. Ignored is the somewhat shorter list of cases cited by respondent, where courts have proscribed publications with equally provocative titles. Appellant's proposed sorting and comparative testing method as a basis for decision has no validity because intrinsically the English language contains no quantitative or qualitative

medium of measurement sufficient to accomplish such a procedure. If it did, the result would be inane because we would thus have avoided our responsibility to make an objective and independent assessment of each book's content in the light of Constitutional principles as applied to it.

The alternative followed by this Court has been to review the questioned material in order to determine whether it falls within the protection of California's statutory definition of obscenity as that statute has been interpreted by our State Supreme Court. That Court's judgment has in turn been molded by the Constitutional principles enunciated by the United States Supreme Court.

The unanimous 1963 decision of the California Supreme Court in *Zeitlin v. Arnebergh,* 59 C2d 901, supra, is the landmark case to which we must look, not only for the method of inquiry, but also for the extent and limitations of our authority. Mr. Justice Tobriner, the author of the Court's opinion, has reviewed the cases eminating from the United States Supreme Court on the subject of obscenity in relation to the free speech provisions of the Constitution. As a result of that study, the opinion concluded that there has been a progressive judicial narrowing of the definition of obscene material to the effect that only "hard-core pornography" is now without the protective cloak of the free speech amendment, and that all else, therefore, on the subject of sex tending toward, but falling short of that category, must be accepted as the free exercise of expression. Based upon a detailed recital of Legislative history, Mr. Justice Tobriner further concluded that the California Legislature, by its 1961 enactment,

intended to and did in fact design its definition of obscenity so as to comport with the narrowed concept that only "hard-core pornography" may be prohibited. He approvingly analyzed the origin, choice and content of the language comprising the definition. Thereupon the opinion concluded ". . . the Legislature wrote a statute which in substance, prohibited hard-core pornography . . ."

From the foregoing, it is reasonable to conclude that the California Supreme Court has validated the Legislature's definition of obscenity and that if any piece of questioned material in its total aspect should reasonably appear to be within the definition, it must be characterized as "hard-core pornography" and as such it is beyond the protection of the Constitution.

Being bound by these principles, we know that the paperback volumes in question before us must be examined in the light of P.C. 311 (a), which defines obscenity as follows:

> "(a) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance."

This Court has completed the unpleasant task of reviewing the seven publications which were the bases of the jury's finding of guilt. To describe the tenor and content of each, no language more appropriate can be found than that contained in the definitive statute just

quoted. It is our appraisal that each of these books constitutes "hard-core pornography." Taken separately or together, they represent the quintessence of obscenity. Not only is each "utterly without redeeming social importance," but worse yet, they represent a design intended to excite unhealthy lust and sexual urges of an aberrational nature. Their predominant appeal is to the emotionally unstable and impressionable element in our socety. Self-evident is their aim to dilute and offset the qualities of sublimation which distinguish the healthy human mind in a civilized society. Only tunnel vision could excuse the realization that the purpose of their publication and dissemination is to create an ever-expanding and profitable market. Paraphrasing the ingredients of the statute's definition, it seems inconceivable that "the average person, applying contemporary standards . . ." could reach a different conclusion. Were we to believe otherwise, the result would be an unwarranted indictment of contemporary standards and also to charge the "average person" with myopia.

We believe that our society, through its legislatures, juries, and judges, has the inalienable right and duty to protect its impressionable offspring and its sexually psychotic fringes from the pernicious spread of such unbridled license. That right is but concomitant to the acknowledged right of society to protect itself against drug abuse or any other social aberration. Authority for that concept is found in the Preamble of our National Constitution. There are set forth several fundamental reasons for its existence. Among these is the necessity to ". . . promote the general Welfare . . ."; all else in the document, including its free speech

and press provisions, is subservient to these oft-forgotten, but controlling purposes.

During the last decade in particular, many sincere, idealistic, intellectual minds within and without our courts have shown extreme sensitivity to any restriction on personal liberty. One result has been the presently narrowed definition of obscenity. Any further restriction of that definition would certainly lead to the complete perversion of the free speech and press guarantees. They are included in the Constitution as a protective shield for the individual against the potential of an overpowering government. If we were to condone these books, it would be but one further step in the process of converting these guarantees from shield to sword. It is necessary only to examine the record and the arguments addressed to us here to know that the sword is being forged and wielded for selfish purposes. Already an industry has been born composed of authors, publishers, purveyors and defenders of infectious filth whose reward is economic gain and whose product is utterly detrimental to the general welfare.

We are not so blind but to know that the product has already reached the proportions of a river. We recognize that this Appellate Court is not possessed of the power nor charged with the responsibility to stanch its flow. We are determined, however, that within the limitations of our authority, its flood will not be increased by so much as one prurient drop.

As another bolster for defendant's appeal, it has been argued that due process was denied him in the course of the trial. Cited in that behalf is *People v. Noroff,* 67 AC 814. That case was decided following the trial of the matter at bar. It holds that due proc-

ess and the First Amendment requires a pretrial hearing by the Court to determine whether the subject material is entitled to constitutional protection. If the Trial Court finds that the material is protected the action must be dismissed; if not protected, the People are allowed to proceed with the trial. In its decision, the Supreme Court has not indicated in *Noroff,* or subsequent cases, at what exact point in the proceedings this hearing must be held, or whether the decision is, or is not, retroactive. Although the record here discloses a request for hearing, none was granted. It appears to us that the deficiency, if any, was procedural only and that the defendant cannot claim prejudice for the reason that hearings were had before the Court although held later than in *Noroff.* The Trial Court reviewed the books once at the end of the People's presentation and again when the defendant made a motion for new trial. In each instance they were found not to be protected by the Constitution. We hold, therefore, that the procedure in substance met the Supreme Court's requirements and that there is thus no necessity to determine whether or not Noroff, supra, should be deemed retroactive.

We cannot conceive of any other particular in which the defendant was denied due process. Quite to the contrary, it appears to us that he had every conceivable protection. He was represented at the trial and before us by counsel who showed amazing expertise in the particular field of his defense. Additionally, he has not only had access to the independent judgment of the Trial Court on the Constitutional questions, but before the matter reached this Court he had access once each to the Presiding Department of the Superior Court,

the District Court of Appeals, and to the Supreme Court. Although appellant has raised various other questions, a review shows a total absence of any basis upon which he can now successfully complain.

In view of the foregoing, the judgments herein are affirmed.

Dated: June 25, 1968.

Marshall S. Hall
Marshall S. Hall, Presiding Judge

We Concur: Peter Anello, Peter Anello, Judge; Albert F. DeMarco, Albert F. DeMarco, Judge.

APPENDIX B.

Opinion of the Superior Court for the County of Santa Clara.

In the Superior Court of the State of California, in and for the County of Santa Clara.

Robert Daly, Petitioner, vs. The Municipal Court for the San Jose-Milpitas-Alviso Judicial District, County of Santa Clara, State of California, Respondent. The People of the State of California, Real Party in Interest. No. 185421.

Filed February 27, 1967.

MEMORANDUM AND ORDER

The petitioner is charged in a complaint filed in the Municipal Court for the San Jose-Milpitas-Alviso Judicial District with a violation of Penal Code Section 311.2. There are sixteen counts to the complaint. The petitioner demurred and moved, in the Municipal Court, for a dismissal of the charges on the ground that the material is not obscene as a matter of law. He made an offer of proof to that court regarding the facts in the case, by which offer of proof, in addition to his attempt to establish that the material was not obscene, he desired also to prove that by reason of his arrest he was forced into a position of self-censorship and that this seriously affected his income. The Municipal Court denied the demurrer and motion and set the case for trial. Petitioner thereupon obtained a peremptory writ of prohibition from this Court and seeks a permanent writ to prevent the Municipal Court from proceeding with his trial.

A motion to vacate the peremptory writ of prohibition was filed on behalf of the People of the State of

California. Both of said matters having been heard and extensive briefs having been submitted, the Court now makes its findings on the issues as follows:

This Court has jurisdiction to determine whether or not a writ of prohibition should issue for constitutional questions have been raised and there is no adequate other speedy remedy. 3 Witkin, *California Procedure,* 2503 et seq.

Petitioner contends that the First Amendment of the United States Constitution and Article 1, Section 9 of the California Constitution require that a hearing be held in the Municipal Court prior to the actual trial, in order that the material can be evaluated by the trial court because if it is determined by that Court not to be obscene, then the defendant is not required to undergo a long and expensive trial. If the trial court cannot so determine, then, he asserts, the matter could proceed to trial. Petitioner also charges that the failure to grant him this preliminary hearing unlawfully deprives him of the legal protection otherwise afforded in criminal cases, to wit: the preliminary determination concerning the fact that a crime has been committed. He further contends that Penal Code Section 311.2 is unconstitutional on its face and as applied to him. He further insists that under the Constitutions he has the right to sell non-obscene matters but that he is threatened with prosecution if he does so, unless it can be determined as a matter of law that said material is not obscene.

It is noted that in the leading case of *Zeitlin vs. Arnebergh,* 59 C. 2d 901, the bookseller brought a declaratory relief action against the city attorney to have the book in question defined as non-obscene in

order to avoid potential prosecution. It is apparent that the language of the court in that decision is one of the basis for petitioner's plea here.

The first matter which can be easily ruled upon concerns the constitutionality of Penal Code Section 311 which petitioner alleges is vague and uncertain. There are two cases upon which he mainly relies, the first, *Katzev vs. County of Los Angeles,* 52 Cal. 2d 360, does not involve obscenity but concerns itself with the constitutional issues of freedom of speech and press and primarily indicates that a reviewing court will make its own independent examination of the evidence regardless of the trial court's determination; the other is *N.A.A.C.P. vs. Button,* 371 U.S. 415, which likewise is not concerned with obscene matter.

In the case of *Roth vs. U.S.,* 1 L.ed. 2d 1498, the Supreme Court of the United States upheld the constitutionality of California's obscenity statute prior to the 1961 amendments. While no case has been found specifically challenging such constitutionality, thereafter the *Zeitlin* case, *supra,* treated the statute as if it were constitutional. The new statute borrowed significantly from the Model Penal Code and attempts to follow the Supreme Court's definition of obscenity as set down in the *Roth* case. Therefore, this Court concludes that the statute is not unconstitutional per se.

Because of the language in the *Zeitlin* case, the petitioner now argues that while the statute may be constitutional, he is placed in the position of being a bookseller who must censor the books which he wishes to sell or risk criminal prosecution, a fine, jail sentence or both, or, at the very least, the stigma of being placed on trial. He asserts that he is entitled to the benefit of

the reasonable doubt as to whether or not the statute is applicable to him. In the case of *In re Klor,* 64 C. 2d 816, a writ of habeas corpus was granted on the basis that mere preparation of obscene material was not a violation of the statute. However, this is of no benefit to the petitioner for he did, in fact, sell the material in question. It is the conduct of the defendant which is a prime issue in the pending case in the Municipal Court, as well as the alleged obscene nature of the materials, which must be considered. By overruling the petitioner's demurrer and motion, the Municipal Court did not exceed its jurisdiction in determining that the statute applied to him. Petitioner seeks to transfer the responsibility for ultimate censorship from himself to the Courts and while this may be the eventual result, in every case in which declaratory relief or a writ of baheas corpus, or of prohibition is sought, the fact remains that the definition of obscenity is as available to petitioner as to the prosecution. If he chooses to sell or distribute materials which are borderline or which have not yet been defined as being either non-obscene or obscene, it is one of the decisions he must make and the fact that he may suffer a pecuniary loss by reason of self censorship, is no legal defense to a prosecution for an alleged violation of such statute.

Turning now to the real contention upon which petitioner's right to a writ of prohibition must stand or fall, the Court must consider the following question: Does the First Amendment of the United States Constitution or Article 1, Section 9 of the California Constitution require that a preliminary, adversary hearing be held on the question of obscenity prior to a trial

for an alleged violation of Section 311.2 of the Penal Code? The Court concludes that they do not.

Unlike those cases involving search and seizure in the matter of obscenity, it is determined that there is no unconstitutional restraint on free expression by virtue of the procedure in this case. The petitioner contends that the thirty-day statutory period between his arrest and his trial is an unconstitutional restraint on free expression. It has been held in *Marcus vs. Property Search Warrant,* 367 U.S. 717; *A Quantity of Books vs. Kansas,* 378 U.S. 205 and *Freedman vs. Maryland,* 380 U.S. 51, that the restraint imposed *in advance of a* final judicial determination on the merits must be limited to a preservation of the status quo for the shortest period possible, in order to avoid the imposition of a de facto censorship by reason of the seizing of obscene material pending a trial. However, no case has been found which specifically requires that a trial court promptly determine, as a matter of law, that the material is or is not obscene.

In the recent case of *People vs. Aday,* 226 Cal. App. 2d 520, which concerned itself with a conspiracy to publish, sell and distribute obscene books, the court held that where there was probable cause for believing that the books were obscene, the matter should be tried. In the *Aday* case the court notes that when property is seized, such seizure is not invalid if made on probable cause, provided that the owner of the books has an adequate remedy by which to litigate the issue of obscenity. It further points out that where the books were not obtained as a result of a seizure but were purchased from a retail outlet, the demands of due process are not violated, the court stating:

> "Under these circumstances, we are satisfied that the safeguards which due process demands do not require that the issue of obscenity be determined prior to the trial of the criminal action."

While it is noted that the defendants in that case did not request such a determination, the court did not feel compelled to state that one was required.

There is a distinction between a restraint which prevents the publishing, sale or distribution of material, thus in effect imposing a censorship without a hearing, and a violation of Penal Code Section 311.2 where the materials are purchased, because the distributor has, in effect, challenged the state to prohibit him from making further distribution or to punish him for a violation of the section. The distinction is that in the one instance there is no freedom of choice, whereas in the other a determination has been made by the vendor that he is not violating any statute. Probable cause is a factual as well as a legal determination.

The legislature in amending the obscenity statute in 1961, while borrowing heavily from the Model Penal Code, omitted a provision which would allow the trial court to make an independent determination of the obscenity of the material. *See:* The American Law Intitute, Model Penal Code Tentative Draft No. 6, Section 207.10. A recent law review article, *Wilson, "California's New Obscenity Statute: The Meaning of 'Obscenity' and the Problem of Scienter,"* 36 So. Cal. L. Rev. 513, 537, discusses the desirability of adding such a provision, but nowhere indicates that it is constitutionally required. It is true, nevertheless, that every judge faced with a censorship or obscenity issue has

the obligation to make an independent determination, which he cannot avoid by classifying the matter of obscenity as being only a factual question, *Lockhart and McClure, "Censorship of Obscenity: The Developing Constitutional Standards,"* 45 Minn. L. Rev. 5, 115, (1960). But, because the trial courts and the appellate courts will each make their own independent finding as to obscenity, what the petitioner is actually seeking is three chances. He wants the trial judge to rule as a matter of law that the material is not obscene; and, if that judge does not so find, then he would like the jury to make that determination; and, if they do not agree with him, he still has the appellate courts to turn to with his arguments.

Lockhart and McClure conclude that the ultimate decision really rests with the appellate judges under the guidance of the Supreme Court. This, likewise, appears to be the result of the decisions in the cases of *Mishkin vs. New York* and *Ginzberg vs. United States.* In *Jacobellis vs. Ohio,* 378 U.S. 184, the Court makes it clear that it will make an independent review of the evidence and not limit itself to the usual determination of whether or not there is sufficient evidence to support the lower court's ruling. In view of this policy, a trial judge might be reluctant to state as a matter of law that the material was not obscene because, if he did not so rule, a jury could make its decision and if the jury found the matter not to be obscene, that would end the case. However, if the jury found the material to be obscene, the defendant still had the right to have an appellate court make its own determination. To require a trial judge, as a matter of mandatory procedure in every case to make such a finding, would

interpose an additional procedural requirement which the legislature has not intended and which it specifically omitted. While it would be helpful to the defendant, it would impose an undue burden upon the trial courts.

The decisions of the U. S. Supreme Court and the other appellate courts have held obscenity to be both a legal and a factual issue. This has caused considerable confusion. It has been brought to this Court's attention that Judge Sprankle of the Los Angeles Superior Court in *People vs. Louros* has expressed the opinion that the trial court *should* determine the legal question before the factual question is submitted to the jury. This Court feels that such a procedure *may* be used, if the trial court wishes to do so, but that it is not constitutionally required. For the foregoing reasons, while the Court expresses its concern with the fact that the petitioner may be involved in a long trial, the same may be said of any other defendant who is charged with a violation of a statute where there is a reasonable cause to believe that an offense has been committed and that the defendant may be guilty thereof. The overruling of the defendant's demurrer and offer of proof was a determination that reasonable cause existed. A trial judge should not be required to decide as a matter of law that which is also an unresolved factual issue. Until the legislature makes such procedure mandatory, it must be held that a trial judge has the discretion to grant or refuse such a motion and

that such refusal does not violate the petitioner's constitutional rights.

It Is, Therefore, Hereby Ordered that the peremptory writ of prohibition be and the same is hereby discharged and the petition for an alternative writ of prohibition is hereby denied.

Dated: February 27, 1967.

George H. Barnett
Judge of the Superior Court

APPENDIX C.

Judgment of the Appellate Department of the Superior Court for the County of Santa Clara.

In the Superior Court of the State of California, in and for the County of Santa Clara, Appellate Department.

People of the State of California, Plaintiff and Respondent vs. Robert S. Daly, Defendant and Appellant. Remittitur No. 161, Muni. Court No. 23384-H.

On appeal from the Municipal Court of San Jose-Milpitas Judicial District of the County of Santa Clara.

And now, on this day, this cause being called, and having been heretofore submitted and taken under advisement, and all and singular the law and premises having been fully considered, the opinion of the Court herein is delivered by Marshall S. Hall.

Whereupon, it is Ordered, Adjudged and Decreed by the Court that the Judgments of the Municipal Court of the San Jose-Milpitas Judicial District of the County of Santa Clara, in the above entitled cause, be and the same is hereby Affirmed.

Presiding Judge, Marshall S. Hall.

We Concur, Peter Anello, Albert F. DeMarco.

Costs awarded on appeal to:

I, George E. Fowles, County Clerk and ex-officio Clerk of the Appellate Department of the Superior Court of the State of California, in and for the County of Santa Clara, do hereby certify that the foregoing is a true and correct copy of the original judgment entered in the above entitled cause on the 3rd day of July, 1968 and now remaining of record in my office.

Witness my hand and the seal of the Court, affixed at my office, this 3rd day of July, 1968.

George E. Fowles, County Clerk
By: K. A. Swanson
Appellate Clerk-Deputy

APPENDIX D.

Constitutional and Statutory Provisions Involved.

1. The pertinent provisions of the First Amendment to the United States Constitution are:

> "Congress shall make no law . . . abridging the freedom of speech or of the press; . . ."

2. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. California Penal Code, §311 provides:

"As used in this chapter:

"(a) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.

"(b) 'Matter' means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or

mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

"(c) 'Person' means any individual, partnership, firm, association, corporation, or other legal entity.

"(d) 'Distribute' means to transfer possession of, whether with or without consideration.

"(e) 'Knowingly' means having knowledge that the matter is obscene."

4. California Penal Code, §311.2 provides:

"Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor."

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In the Supreme Court of the United States

OCTOBER TERM 1968

No. 699

ROBERT S. DALY,
Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

On Petition for Writ of Certiorari to the Appellate Department of the Superior Court of the State of California for the County of Santa Clara

Brief for Respondent in Opposition

THOMAS C. LYNCH
Attorney General of California

ARLO E. SMITH
Chief Assistant
Attorney General, Criminal

ALBERT W. HARRIS, JR.
Assistant Attorney General

MICHAEL J. PHELAN
Deputy Attorney General

6000 State Building
San Francisco, California 94102
Telephone: (415) 557-0298

Attorneys for Respondent

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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In the Supreme Court of the United States

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No. 699

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Brief for Respondent in Opposition

OPINIONS BELOW

The recital in the Petition concerning opinions rendered by the lower courts is considered accurate and complete.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

Six federal constitutional questions are advanced by petitioner. We believe that only two such questions exist in this case. The others he asserts are unsubstantial and fail

to rise to the level of federal constitutional questions or are foreclosed by the decisions of this Court.[1]

---

1. Petitioner's third claim of constitutional error is that the trial court's jury instructions defining the words "shameful" and "morbid" (which are found in California's statutory definition of "prurient interest," Calif. Pen. Code § 311) were overbroad and vague. He suggests, "It would punish and suppress the sale and distribution of books upon the finding of a judge or jury that the *effect* of the book upon the average reader would be 'outrageous' or 'scandalous' or 'unwholesome.'" Pet. at p. 30. [Emphasis added.] The suggestion is without merit. The trial court instructed the jury that the words "shameful" and "morbid" were not defined in the statute. He then gave dictionary definitions as follows: "Shameful: Dishonorable, disreputable, ignominious, infamous, outrageous, scandalous, degrading. Morbid: Sick, unwholesome, unhealthy." (Settled Statement on Appeal, p. 6). Thus, the court's instructions contained nothing which intimated that the jury was to consider "effect." These supplemental instructions, given at the jury's request during deliberations, were merely a refinement of the definition of "prurient interest," to which books must "appeal" if they are to be found obscene.

Petitioner's fourth assignment of constitutional error is likewise wholly lacking in substance. It is contended that the trial court's instruction to the jury that appeal to prurient interest may be satisfied if they determine beyond a reasonable doubt that the material "appeals to the prurient interest of a clearly defined deviant sexual group" was constitutionally impermissible because the appeal must be to the "average person." This Court has clearly held to the contrary in *Mishkin v. New York*, 383 U.S. 502, 507-510 (1966).

Petitioner's fifth alleged constitutional question is that the trial court's instruction on the issue of "pandering was a denial of due process. Yet, the instructions were plainly in accordance with this Court's decision in *Ginzberg v. United States*, 383 U.S. 463 (1966). Thus, no federal constitutional issue is present, regardless of whatever state law questions there might be. *Cf.*, *People v. Noroff*, 67 Cal.2d 791; 63 Cal.Rptr. 575; 433 P.2d 479 (1967); *People v. Rosakos*, 268 A.C.A. 534, 74 Cal.Rptr. 34 (1968).

Finally, petitioner asserts constitutional error in the alleged failure of the prosecution to prove appeal to the prurient interest of a "normal person," failure to prove that the books exceeded contemporary community standards and that they lacked redeeming social importance. While such questions may be raised under state law *see*, *In re Giannini and Iser*, 69 A.C. 588, 72 Cal.Rptr. 655, 446 P.2d 535 (1968); *People v. Rosakos, supra*, 268 A.C.A. 534, 74 Cal.Rptr. 34 (1968), no federal issue is presented by these claims. *Phelper v. Decker*, 401 F.2d 232, 238-39 (5th Cir. 1968). Further, with respect to the question of appeal to the "normal person," this Court's decision in *Mishkin, supra*, is dispositive.

The two issues fairly presented by the record are:

(1) Whether each of the books bearing the titles "Blood Orgy," "His Brother Love," "Pay the Devil," "The Flesh Worshipers," "Never on Sin Day," "Gay Reunion," and "That Kind of Girl," is obscene and thus beyond the freedom of expression protections provided by the First and Fourteenth Amendments.

(2) Whether the trial jury was given a constitutionally proper definition under which it was to judge "scienter," and whether petitioner's convictions of the offense of distributing obscene matter rest upon constitutionally sufficient proof of "scienter."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Constitution and the California Penal Code are set forth in Appendix D to the Petition.

STATEMENT OF THE CASE

On April 20, 1966, a complaint was filed in the Municipal Court for the San Jose-Milpitas-Alviso Judicial District, Santa Clara County, California, in which petitioner was charged with sixteen counts of a violation of California Penal Code section 311.2, distribution of obscene matter.[2] Pleas of not guilty were entered (Minutes of Proceedings in the Municipal Court, p. 2, hereinafter referred to as "Minutes"). Following lengthy pretrial proceedings both

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2. At this time we are unable to meet fully the requirements of Rule 40, 1(e), Revised Supreme Court Rules, regarding references to the record. We have examined the original files of the lower courts and found that the records contained therein were not paginated. Apparently, the single copy of the record certified to the Court under Rule 12 is the only one which is paginated. Counsel for petitioner informed us that he did not have a copy of the paginated record which we might borrow. We will, however, refer to specific documents and exhibits found in the certified record which can be readily identified and located.

before the trial court and courts of higher jurisdiction, the case came to trial on March 20, 1967 (Minutes, pp. 2-5). On April 29, 1967, the jury returned guilty verdicts on seven of the twelve counts of the complaint. These involved paperback books entitled "Blood Orgy" (Count One); "His Brother Love" (Count Four); "Pay the Devil" (Count Eight); "The Flesh Worshipers" (Count Nine); "Never on Sin Day" (Count Fourteen); "Gay Reunion" (Count Fifteen); and "That Kind of Girl" (Count Sixteen). The jury returned not guilty verdicts on the following materials: a film entitled "New and Better Strips" (Count Two); another untitled film (Count Three); a book entitled "Lesbian Love Play" (Count Six); a book entitled "Sexperiment" (Count Seven); a set of twelve photographs of a Negro woman (Count Ten); a set of twelve photographs of two Caucasian women (Count Eleven); and a book entitled "The French Way" (Count Twelve). The jury was unable to reach a verdict as to Counts Five and Thirteen and a mistrial was declared as to them (Minutes, pp. 16-17).

Following numerous post-trial motions (Minutes, pp. 17-18), petitioner was placed on probation for a period of three years on the conditions (among others) that he serve one year in the county jail and pay a fine of $1,000 (Minutes, p. 19). An appeal was taken to the Appellate Department of the Superior Court (Minutes, p. 20). That court affirmed on June 26, 1968. (Appendix A to Petition).

During the trial, investigators for the Santa Clara County District Attorney's office testified that they visited petitioner's book store and purchased the materials which were the subject matter of the convictions. They testified that they saw a sign reading "No Minors" but at no time during their five visits did they see an exterior sign reading "Adults Only." Petitioner testified that various signs limiting patronage to adults were posted both inside and out-

side of the store. He testified that the rule against the presence of minors was enforced. There was no evidence of minors being involved in the case. Nor was there any evidence indicating sale of materials to sexual deviants. Photographs of the front of petitioner's store were taken the day after his arrest and introduced as People's Exhibit 3. (Settled Statement on Appeal, p. 3).

The prosecution witnesses testified that the walls of the store were covered with display racks containing nudist magazines showing exposed male and female genitalia and other pictures of nude and semi-nude males and females. Other shelves and racks contained sex-oriented paperbacks. A glass showcase case contained film, some boxes of which had still photos of semi-nude females in provocative poses pasted on the outside. The investigators testified that they saw no matter dealing with subjects other than sex and nudity. However, petitioner testified that he had some dictionaries and "Westerns" for sale in addition to the above described materials. He also testified that nothing was kept "under the counter," and that all merchandise was in full view. (Settled Statement on Appeal, p. 4).

The prosecution called Dr. John Peschau, a psychiatrist experienced in diagnosing and treating sexual deviants who was employed by a state hospital. During his testimony he defined such terms as "sadism," "masochism," "male and female homosexuality," and others. He was shown the covers of several of the books involved in this case which contained deviant descriptions and stories. Hypothetical questions reflecting the contents of the books in issue were asked of Dr. Peschau. He also testified to the effect of the covers alone on the "prurient interest of a deviant." (Settled Statement on Appeal, pp. 3-4).

A tape recording of an interview of petitioner by District Attorney's Investigator Douglas Logan and San Jose

Police Sergeant Ralph Brune was admitted in evidence as People's Exhibit 2. (Minutes, p. 6; Settled Statement on Appeal, pp. 4-5). That tape recording reflects that on March 14, 1966, petitioner was advised by these officers that in their opinion he had materials in his store which were pornographic and obscene. They advised him that if he continued to sell such materials he did so at his own risk. Petitioner responded, "If you show me it, I'll remove it from the shelf." The officers emphasized that they were not present to act as censors. They did not specifically advise him that any particular materials were obscene. Petitioner went on to explain that he remained "three to six months behind any other of this type of business—because I don't want to break no ice—I just want stuff that is legal. . . ." Petitioner persisted in asking the officers to point out items which they believed were obscene. Mr. Logan again stated that they did not intend to act as censors. He advised petitioner that he should be able to judge the materials himself. Petitioner responded by stating, "That's what I've been working on—on that theory." He related how he had asked customers for their definitions of obscene and that he had obtained a variety of answers. Then he went on to state, "So I put it this way—any human contact, this goes whether it's between male to male or male to female—definitely, to me, is pornography and obscene. I won't have none of that. When I say—human contact—I mean sexual contact." (People's Exhibit 2).

Petitioner went on to state that he carried "nudie" and "girlie" magazines and books in his store. He stated that he had a limited number of films. With respect to films, he indicated that he "keeps it down—to make sure." After explaining about these items of his stock, he went on to state, "I am operating on spicy literature because I think that is what the man is for—spicy literature. They want

something that is, you know, in the spicy line, dealing in sex. I believe that much." (People's Exhibit 2).

At the conclusion of the interview, District Attorney's Investigator Logan advised petitioner that any contacts he had had with the district attorney's office or the police department should not be construed as an endorsement of any of the materials which he purveyed. (People's Exhibit 2).

Petitioner offered two books into evidence, "My Secret Life" and "The Story of O," to establish contemporary community standards. The trial judge ruled that the book "My Secret Life" was not comparable to any of the materials in evidence and refused its admission. The book "The Story of O" was ruled comparable but no satisfactory evidence was elicited from petitioner's expert witness, a Mr. Lilienthal, that the book had gained acceptance by the community as a whole. (Settled Statement on Appeal, p. 4).

The trial judge instructed the jury on the issue of "scienter," that it was only necessary for the prosecution to establish that petitioner was "aware of the contents of the materials" and that it was "not necessary to show that he knew it was obscene." They were further instructed that if petitioner was found to have knowledge of the contents of the materials, "then he had knowledge within the meaning of the law no matter what he may have thought concerning the alleged obscenity of the materials." (Settled Statement on Appeal, p. 2).

I. The Paperback Books Which Are the Subject Matter of Petitioner's Convictions Are Obscene.

The thrust of petitioner's case for granting certiorari is that the books purchased in his store are comparable to, if not indistinguishable from, many of the writings to which this Court recently accorded constitutional protection

(Pet. pp. 18-21).[3] We are not in a position to compare and contrast the sordid publications in this case with those involved in the cases upon which petitioner relies. Even if this were feasible, we doubt whether such efforts would be especially helpful. It would appear to be a futile exercise in sophistry for we do not know with any certainty what the precise basis for these decisions was since the Court chose to deal with them by per curiam decisions. This recent obscenity *vel non* approach precludes meaningful analysis. The Court's citation in each case (except *Corinth Publications*) to *Redrup v. New York,* 386, U.S. 767 (1967), is, of course, not particularly instructive since that case too was decided in a cryptic manner. As Mr. Justice Harlan has observed, ". . . no stable approach to the obscenity problem has yet been devised by [the] Court." *Memoirs v. Massachusetts,* 383 U.S. 413, 455 (1966) (dissenting opinion). More recently, he aptly described our predicament as one of "utter bewilderment." *Ginsberg v. New York,* 390 U.S. 629, 707 (1968) (concurring opinion); *Interstate Circuit v. Dallas,* 390 U.S. 676, 707 (dissenting opinion).

But despite the reference in *Redrup* to the divergent views of individual members of the Court and the opinion's omnibus conclusion that: "Whichever of these constitutional views is brought to bear upon the cases before us, it is clear that the judgments cannot stand." 386 U.S. at 771, we must assume that the three element formula first announced in *Roth v. United States,* 354 U.S. 476 (1957), still has vitality. Since the three elements must "coalesce,"

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3. The cases relied upon are: *Aday v. United States,* 388 U.S. 447 (1967); *Books Inc. v. United States,* 388 U.S. 449 (1967); *A Quantity of Books v. Kansas,* 388 U.S. 452 (1967); *Corinth Publications, Inc. v. Wesberry,* 388 U.S. 448 (1967); *Keney v. New York,* 388 U.S. 440 (1967); *Friedman v. New York,* 388 U.S. 441 (1967); *Mazes v. Ohio,* 388 U.S. 453 (1967); *Shepard v. New York,* 388 U.S. 444 (1967); *Avansino v. New York,* 388 U.S. 446 (1967).

Memoirs v. Massachusetts, supra, 383 U.S. 413, 418 (1966), if any one element is missing a finding of obscenity cannot be sustained. We have then, assumed that the decisions upon which petitioner relies are based upon the belief of at least a plurality of the members of the Court that, in spite of the books' preoccupation with sexual description, they somehow possessed redeeming social value or lacked patent offensiveness. We approach this case upon the assumption that the three element test will be the relevant constitutional criterion under which the materials here involved will be judged.

This Court is the final arbiter of the question of whether materials are obscene and beyond the mantle of First Amendment protection and must itself review the books in issue. *Jacobellis v. Ohio,* 378 U.S. 184, 188 (1963); *Manual Enterprises v. Day,* 370 U.S. 475, 488 (1961); *Roth v. United States, supra,* 354 U.S. 476, 497-98 (1957) (Concurring opinion). Thus, a detailed review of them appears unnecessary. However, petitioner depicts these books as ones which readily meet contemporary community standards of candor in the representation of sexual matters and which also constitute literary efforts of substantial merit (Pet. pp. 13-18). Indeed, petitioner's summation of the books makes us wonder whether we are talking about the same publications. For as we read them, they are worthy of none of the glowing comments attributed to them. Thus, while the Court itself must review and assess these turgidly sexual tracts, we nevertheless submit our comments concerning their contents.

"Blood Orgy" (Count One; People's Exhibit 12), deals with the sexual adventures of two middle-class American families and other secondary characters. Characterization in this tale is weak and unreal. The plot is a grossly detailed account of unusual sexual practices thinly held together by

arbitrary events which thrust the characters from one sexual episode to the next. Its theme must be said to be exclusively sexual. It contains graphic descriptions of female oral copulation on female, female on male, etc. and concludes with an act of sadistic torture, patricide and sodomy by a son on his father's corpse. The suggestion by petitioner that "[t]he book directs attention to the dangers of the development of a cruel and violent personality and the need to prevent such development by adult example" (Pet. p. 14), falls woefully short of being a satisfactory justification for the book's blatantly dominant theme of the description of perversity.

The book "His Brother's Love" (Count Four; People's Exhibit Four) deals with sexual encounters of various heterosexual and homosexual characters. These encounters are detailed against the background of a dress business in a big city. It describes the struggles of a homosexual girl designer and a "normal" girl designer for the sexual affections of a third party, a male business consultant who is apparently "bisexual." The sexual acts described in the story are minutely detailed. A typical sex act requires eight or nine pages of descriptive and clinical writing. The author places his characters into situations where they may observe the sexual activities of others from hidden vantage points. Thus, for example, in Chapter XIII one man watches three others writhe about in homosexual intercourse. The book's predominant theme of the description of various forms of sex acts dealt with in erotic detail is plainly visible through the thin veil of an inane plot. In any traditional literary sense, the book cannot be said to have meaning or worth.

Count Eight of the complaint concerns the book "Pay the Devil" (People's Exhibit 9). It purports to deal with the rise and fall of one Matt Colby, a young man who is

first encountered as he engages in oral copulation with a young lady in the rear of a grocery store. Colby's sexual exploits (which constitute 126 of the book's 159 pages) involve activities such as oral copulation, sodomy, sadistic love making, voyeurism and sadism. Plotwise, the book is a sexual fantasy intertwined with meaningless encounters and incidents which first ally Colby with gangsters and then separate him from the world by murder at their hands. The plot, if such it can be called, is visibly contrived. More aptly, it could be described as a sequence of events rather than a plot. The characters in the story lack authenticity and must be considered to have been created by a distorted mind.

The book, "The Flesh Worshipers," by Jack Weeds (Count Nine; People's Exhibit 7), centers on the sexual activities of a group of people who survive an airplane crash in the jungle. The book itself states that it is "unbelievably depraved." It is also unbelievably stilted and unreal in its characterization. The plot is absurd and the descriptions gross. By Chapter II the book has progressed from male-female sex acts to oral copulation. By Chapter IV it describes the Reverend Elder Pepperdine performing perversely with an artificial device and two young women. A man is sodomized by a wooden phallus in the hands of women. It concludes its fantastic description of sexual exploits by a mass "daisy chain" orgy and murder. In petitioner's view, "The book exemplifies the dangers which good people may encounter when they lose self control, willingly or unwillingly, over their lives and actions and fail to canalize and maintain a balance between their basic instincts and the demands of an ordered society." (Pet. pp. 15-16). Petitioner must surely be given credit for this imaginative assessment. But it would seem exceedingly remote that anyone reading this volume would find such an altruistic message.

The book purportedly written by a Peter Dunning entitled "Never on Sin Day" (Count Fourteen; People's Exhibit 16) again deals exclusively with sexual activity. A young man from Iowa moves to Los Angeles to study animal husbandry. Homosexual acts pervade the book to the exclusion of any rational content. It requires two-thirds of its length to get its leading male character to bed with a female. Occasionally, the text deals in matters such as the content of a nude male art magazine. It features such activities as a homosexual pet party and a nude orgy. But, its sexual preoccupation completely overshadows a fragmentary and absurd plot. If it has a theme at all it can only be said to be sexual description. Technically speaking, the book may be described as an irreparable disaster.

There is no real beginning to the book "Gay Reunion" (Count Fifteen; People's Exhibit 19). The opening twelve pages consist of a sexual fantasy by a female named Charlotte Charming. Dreams play an essential part in the fabrication of this story as the principal character always dreams a sex fantasy before experiencing it in vivid, graphic fact. The plot of the book is a sexual production line that passes the characters along from one erotic encounter to another. The final page of the story contains a line which is a magnificent understatement: "A fantastic story, perhaps even unbelievable." Moreover, the book is barely readable.

The final book, "That Kind of Girl," (Count Sixteen; People's Exhibit 17), deals with lesbianism, orgiastic activities and occasional heterosexual encounters. The plot tries to develop from a blackmail situation in which one of the principal female characters is threatened by the disclosure of certain lewd photographs of her engaged in lesbian activities. Sex is the theme here, and no detail is too graphic. Oral sex acts by lesbians are dealt with minutely. The book only gives the outward appearance of a novel. If

sexual description were eliminated, the book would disappear.

In evaluating these publications, we ask the Court to bear in mind that there seems little doubt that if the contents of these books were transformed into the medium of a motion picture, there would be no doubt as to their obscene character. We submit that there should be no significant constitutional difference between the media chosen by purveyors of smut. But see, *Landau v. Fording,* 245 Cal.App.2d 820, 827, 54 Cal.Rptr. 177, 181 (1966), *aff'd,* 388 U.S. 456 (1967). These books, which verbally describe perverted and bizarre sex acts in near clinical detail, are no less offensive to contemporary community standards relating to the description or representation of sexual matters than is a motion picture film which graphically portrays such conduct. Likewise, the appeal to prurient interest is the same. We submit that they are manifestly obscene. They possess no recognizable trace of redeeming social value. That social value which has been attributed to them by petitioner is ingeniously contrived and artificial. In short, they should not be accorded constitutional protection. On this ground, certiorari should be denied.

II. A Proper Standard of "Scienter" Was Applied in This Case and the Evidence of Petitioner's Knowledge of the Contents of the Obscene Books Is Constitutionally Sufficient.

Petitioner's second ground of constitutional challenge to his convictions is that, "The record is barren of any evidence to establish that petitioner knew the contents of the books or that the contents were obscene. . . ." Pet., p. 25. We submit that this claim likewise does not warrant granting certiorari. The instructions to the jury were in accord with this Court's decisions and there is ample evidence in the record of petitioner's "scienter" which satisfies the

constitutional criteria so far established by this Court. At this juncture then, we do not treat this perplexing issue in depth for we submit that this case affords no occasion for reexamination or refinement of the "scienter" requirements. *Cf., Ginsberg v. New York, supra,* 390 U.S. 629, 643-45 (1968).

California Penal Code section 311.2, under which petitioner's convictions were obtained, makes it a crime to "knowingly . . . distribute obscene matter." The word "knowingly" is defined in subdivision (e) of Penal Code section 311. " 'Knowingly' means having knowledge that the matter is obscene." This statutory definition has been amplified by judicial interpretation.

In *People v. Campise,* 242 Cal.App.2d Supp. 905, 51 Cal. Rptr. 815 (1966), *overruled on other grounds, Flack v. Municipal Court,* 66 Cal.2d 981, 992, n. 12, 59 Cal.Rptr. 872, 429 P.2d 192 (1967), the court declared that:

> ". . . a reasonable construction of Penal Code, section 311, subdivision (e) is as follows: The defendant must have known the contents of the material, and must have been in some manner aware of its obscene character.
>
> "In short, it is not necessary to construe 'knowledge that the matter is obscene' as meaning 'knowledge that a court would decide the matter to be obscene.' " 242 Cal.App.2d Supp. at 915, 51 Cal.Rptr. at 821-22.

Similarly, in *People v. Pinkus,* 256 Cal. App. 2d Supp. 941, 63 Cal.Rptr. 680 (1967), the court stated:

> "To construe the code language to mean that an accused must know that the matter will actually be held constitutionally obscene by the highest court of the land is not a workable standard. Such a construction of Penal Code, section 311, subdivision (e) would altogether stultify obscenity prosecutions.
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> • • • • • • •
>
> "We cannot impute to the Legislature an intent to employ the words 'knowledge that the material is

obscene' in a sense that would render prosecutions under Penal Code, section 311.2 an impossibility. Awareness of the contents of a matter and that it is of obscene character or nature was all that was intended and all that is constitutionally required." 256 Cal.App. 2d Supp. at 949-950, 63 Cal.Rptr. at 685-86. *See also, People v. Harris,* 192 Cal.App.2d Supp. 887, 13 Cal. Rptr. 642 (1961), *rev'd sub. nom. on other grounds, In re Harris,* 56 Cal.2d 879, 16 Cal.Rptr. 889, 366 P.2d 305 (1961), *vacated on other grounds,* 374 U.S. 499 (1963); *People v. Williamson,* 207 Cal.App.2d 839, 845-46, *hrng. den.* (1962), *cert. den.* 377 U.S. 994 (1964), *overruled on other grounds, In re Giannini and Iser, supra,* 69 A.C. 588, 602, 72 Cal.Rptr. 665, 446 P.2d 535, 545 (1968).

These interpretations[4] comport with this Court's holdings which have outlined the minimal requirements for proof of "scienter" in the First Amendment context. In *Smith v. California,* 361 U.S. 147 (1959), Mr. Justice Brennan's opinion for the Court stated:

"We need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a book seller for carrying an obscene book in stock; whether honest mistake as to whether its contents in fact constituted obscenity need be an excuse; whether there might be circumstances under which the State constitutionally might require that a book seller investigate further, or might put on him the burden of explaining why he did not, and what such circumstances might be. Doubtless any form of criminal obscenity statute appli-

4. Petitioner relies upon a statement of the interpretation of the statutory definition of "knowledge" contained in a report submitted by this office to the California Legislature (Pet. p. 5, n. 2). Report to the California Legislature on Obscentity: The Law and the Nature of the Business (April 6, 1967). As the cases in the preceding text plainly demonstrate, the incidental statement to which petitioner refers was in error or, at least, a gross oversimplification.

> cable to a bookseller will induce some tendency to self-censorship and have some inhibiting effect on the dissemination of material not obscene, but we consider today only one which goes to the extent of eliminating all mental elements from the crime." *Id.* at 154-55.

The separate opinions of justices other than those joining in the majority opinion in *Smith* lend further meaning to this discussion. Mr. Justice Black concurred in the decision overturning the Los Angeles Municipal Ordinance but in so doing specifically disapproved the Court's treatment of the scienter issue. As he read the majority opinion, the scienter requirement needed little by way of proof. The character of proof was also indicated. "The Court's opinion correctly points out how little extra burden will be imposed on prosecutors by requiring proof that a book seller was *aware of a book's contents* when he possessed it." [Emphasis added.] 361 U.S. at 156 (concurring opinion).

Mr. Justice Frankfurter's concurring opinion in *Smith* likewise sheds light on the scope of the majority opinion. He stated:

> "Obviously the Court is not holding that a bookseller must familiarize himself with the contents of every book in his shop. No less obviously, the Court does not hold that a bookseller who insulates himself against knowledge about an offending book is thereby free to maintain an emporium for smut.
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> * * * * * * *
>
> [T]he proof of scienter that is required to make prosecutions for obscenity constitutional cannot be of a nature to nullify for all practical purposes the power of the State to deal with obscenity. Out of regard for the State's interest, the Court suggests an unguiding, vague standard for establishing 'awareness' by the bookseller of the contents of a challenged book in contradiction of his disclaimer of knowledge of its contents. A bookseller may, of course, be well aware of the nature

> of a book and its appeal without having opened its cover, or, in any true sense, having knowledge of the book. As a practical matter therefore the exercise of the constitutional right of a State to regulate obscenity will carry with it some hazard to the dissemination by a bookseller of non-obscene literature. Such difficulties or hazards are inherent in many domains of the law for the simple reason that law cannot avail itself of factors ascertained quantitatively or even wholly impersonally." 361 U.S. at 161, 164 (concurring opinion).

In *Mishkin v. New York, supra,* 383 U.S. 502, 510 (1966), Mr. Justice Brennan again spoke for the Court on this issue. In reviewing a New York conviction under a criminal obscenity statute, the Court approved of the New York Court of Appeals interpretation of that state's statute. The statute was interpreted as meaning "that only those who are *in some manner aware of the character of the material they attempt to distribute* should be punished. It is not innocent but calculated purveyance of filth which is exorcised...." *People v. Finkelstein,* 9 N.Y.2d 342, 344-45, 174 N.E.2d 470, 471 (1961). (Emphasis added).

And, last term in *Ginsberg v. New York, supra,* 390 U.S. 629 (1968), the *Finkelstein* definition was again approved. It was said:

> "When [the statute prohibiting sale of obscene material to minors] was before the New York Legislature its attention was directed to *People v. Finkelstein,* as defining the nature of *scienter* required to sustain the statute [citation omitted]. We may infer that the reference in [the statute] to knowledge of 'the *character* and content of any material described herein' incorporates the gloss given the term 'character' in *People v. Finkelstein.* In that circumstance *Mishkin* requires rejection of appellant's challenge...." *Id.* at 644.

This Court concluded in *Mishkin* that, "The New York definition of ... scienter ... fully meets the demands of the Constitution." 383 U.S. at 511 (footnote omitted). We submit that California's definition of scienter is no less demanding and that the instructions given the jury in this case fully met the constitutional requirements. The trial judge instructed the jury that the scienter element would be satisfied if it were established beyond a reasonable doubt that petitioner was aware of "the contents of the materials." That instruction, we submit, satisfies the criteria of *Smith, Mishkin,* and *Ginsberg.*

Petitioner's challenge to the sufficiency of the evidence of "scienter" fails to present a federal constitutional question. Given the premises that the jury was properly instructed and that there was some evidence in the record to support the finding implicit in the verdicts that petitioner was aware of the contents of the books, a challenge to the quantum of evidence does not give rise to an issue of due process. *Phelper v. Decker, supra,* 401 F.2d 232, 238-39 (5th Cir. 1968). It is only where the prosecution introduces no evidence to establish any elements of any offense that due process is denied. *Garner v. State of Louisiana,* 369 U.S. 157 (1961); *Thompson v. City of Louisville,* 362 U.S. 199 (1960); *cf. Jacobellis v. Ohio, Supra,* 378 U.S. 184, 202 (1964) (Warren, C. J., dissenting).

In any event, there was plainly ample evidence of petitioner's knowledge concerning the contents of the books. The tape recording (People's Exhibit 2) of the conversation between petitioner and the two investigating officers discloses beyond peradventure that petitioner knew of the contents of the books he was selling. When it was suggested that he was old enough to judge his wares by himself, he answered, "That's what I've been working on—on that theory." Petitioner also expressed his own view of what

constituted obscenity. "So I put it this way—any human contact, this goes whether its between male to male or male to female, definitely to me is pornography and obscene. I won't have none of that. When I say human contact, I mean sexual contact." He further indicated that obscenity "is to the point where there is lewd suggestive motion." He indicated that he "stayed three to six months behind other stores" so that if any obscene matter were being sold it would be caught before he brought it into his store. He said, "I don't want to break no ice." Finally, petitioner described the kinds of materials he maintained in his store including the "nudie" and "girlie" books as well as the films and photographs. He explained how he kept everything out of sight from the outside of his store especially so that children who might be walking by would not see anything. With respect to the books, he stated significantly, "I am operating on spicy literature because I think that that's what the man is for—spicy literature—they want something that is, you know, in the spicy line, dealing in sex. I believe that much." (People's Exhibit 2). We submit that this evidence and the inferences properly drawn therefrom is constitutionally sufficient to support the finding of "scienter" in this case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Dated: February 26, 1969.

THOMAS C. LYNCH
Attorney General of California

ARLO E. SMITH
Chief Assistant
Attorney General, Criminal

ALBERT W. HARRIS, JR.
Assistant Attorney General

MICHAEL J. PHELAN
Deputy Attorney General

Attorneys for Respondent

SUPREME COURT, U. S.

FILED

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IN THE

Supreme Court of the United States

October Term, 1968
No. 699

ROBERT S. DALY,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR REHEARING.

STANLEY FLEISHMAN,
1680 Vine Street,
Hollywood, Calif. 90028,
Counsel for Petitioner.

SAM ROSENWEIN,
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 685-9790

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IN THE

Supreme Court of the United States

October Term, 1968
No. 699

ROBERT S. DALY,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR REHEARING.

Petitioner prays that this Court grant rehearing of its order of March 24, 1969 denying the petition for a writ of certiorari, and that a Writ of Certiorari issue to review the judgment of the Appellate Department of the Superior Court of the State of California for the County of Santa Clara, entered in the above entitled case on July 3, 1968, as prayed for in the Petition filed October 28, 1968 herein.

Reasons for Granting Rehearing and Issuing the Writ.

1. There are two grounds upon which this Petition for Rehearing are based, which are confined to intervening circumstances of substantial effect and which are available to petitioner, not previously presented. The questions now presented arise because of the Court's refusal to grant review in a case in which a book-

seller has been subjected to a harsh and cruel sentence of imprisonment for one year, together with a substantial fine and three years probation, under a state obscenity statute which as construed and applied to petitioner is clearly unconstitutional under the decisions of this Court.

The grounds for this Petition for Rehearing are:

(a) As a result of this Court's denial of a petition for a writ of certiorari, the petitioner has been subjected to an unforseeable and retroactive judicial enlargement of the state obscenity statute, contrary to the Due Process Clause of the Fourteenth Amendment. This retroactive judicial expansion of the state obscenity statute renders the statute vague and overbroad and contrary to the free speech and press provisions of the First Amendment subsumed into the Due Process Clause of the Fourteenth Amendment as a limitation upon state action.

(b) As a result of this Court's denial of a petition for a writ of certiorari, the standards and criteria for judging obscenity as enunciated by this Court in *Roth, Jacobellis, Memoirs* and *Redrup* have become so vague, ambiguous and overbroad as to deprive this petitioner and the community generally to access to constitutionally protected material, and subjected all persons engaged in the publication, distribution or circulation of books, magazines and other media of communication to pervasive censorship and criminal prosecutions without ascertainable standards of guilt.

2. Among the questions presented to this Court were, first, whether the state obscenity statute, as construed and applied by the courts below to authorize con-

viction of petitioner upon the ground that each of the books involved were obscene and not entitled to constitutional protection, abridged the exercise of freedoms of speech and press contrary to the free speech and press provisions of the First Amendment and the due process provisions of the Fourteenth Amendment; and, second, whether the statute, as construed and applied to authorize the conviction of petitioner without proof that petitioner knew the contents of the books or knew that the contents of the books were obscene, also violated the free speech and due process provisions of the First and Fourteenth Amendments.

Petitioner was convicted under the state obscenity statute for the sale of certain specified books when, under the standards and criteria enunciated by this Court, such conduct could not be constitutionally punished. It is submitted, with due deference, that the books involved herein are not substantially different and are in all respects comparable to the multifarious books and other writings which this Court has held to be constitutionally protected. *Redrup v. New York,* 386 U.S. 767; *Aday v. United States,* 388 U.S. 477; *Books, Inc. v. United States,* 388 U.S. 449; *Quantity of Copies of Books v. Kansas,* 388 U.S. 452; *Corinth Publications, Inc. v. Wesberry,* 388 U.S. 448; *Keney v. New York,* 388 U.S. 440; *Friedman v. New York,* 388 U.S. 441; *Mazes v. Ohio,* 388 U.S. 453; *Shepard v. New York,* 388 U.S. 444; *Avansino v. New York,* 388 U.S. 446. The books herein therefore do not, under the constitutional standards and criteria promulgated by this Court, exceed contemporary community standards, or appeal to prurient interest, and are not utterly without social importance.

The standards adopted by the court below in judging the alleged obscenity of the material arbitrarily and capriciously disregarded the constitutional tests promulgated by this Court, and it is not conducive to the true administration of justice under the fundamental law to permit the ruling to stand, it is submitted.

Under the circumstances, the petitioner has been placed in a position where he had no reason to suppose that he was violating a criminal statute which under the rulings of this Court could not be applied to him, and he plainly had no reason to believe that this Court would permit the statute to be so construed and applied as to retroactively bring his conduct within the scope of the state obscenity statute. This is clearly a case of punishment, *ex post facto,* and raises the harsh and arbitrary results which were the subject of condemnation by this Court in *Bouie v. City of Columbia,* 378 U.S. 347, and *Shuttlesworth v. City of Birmingham,* October Term, 1968, No. 42, 37 L.W. 4203. It is the same hardship, in more virulent form, so far as this retailer is concerned, as was discussed by the dissenting opinions in *Ginzburg v. United States,* 383 U.S. 463, 477-478, 493-497, 500. See also, *United States v. Ginzburg,* 398 F. 2d 52 (3 Cir. 1968).

In addition, the petitioner herein has been convicted under a construction of the state obscenity statute which permitted the jury to convict the petitioner solely upon proof of knowledge of "contents" of the material, and without any proof that the petitioner knew the alleged obscene character of the books involved. Again, such construction is directly contrary to the rulings of this Court holding that any obscenity statute which is so construed and applied as to punish a retailer, or any

other person, solely upon alleged knowledge of the contents of the material without any proof that such individual knew that the material was allegedly obscene arbitrarily results in a deprivation of liberty without due process of law and constitutes an abridgment of speech and press in violation of the First and Fourteenth Amendments. *Smith v. California,* 361 U.S. 147; *Mishkin v. New York,* 383 U.S. 502, 510-511; *Ginsberg v. New York,* 390 U.S. 629, 643-645. Thus, by the denial of the petition for a writ of certiorari herein, innocent conduct and guiltless behavior under the prior rulings of this Court have been made retroactively illegal, and a state obscenity statute which could not constitutionally be applied to this petitioner at the time the books involved were sold has now been retroactively enlarged to encompass conduct which petitioner had no reason to believe came within the purview of the statute.

In *Redrup-Austin,* 384 U.S. 916, the grant of certiorari was initially limited to the question of *scienter,* a question of substantial importance which plainly required determination by this Court. Yet the question was not answered when the decision was finally rendered, 386 U.S. 767, and all the important issues revolving around the question of *scienter* still remain unanswered by this Court. As a result, guidelines for law enforcement officials, judges, and juries in obscenity prosecutions are still unavailable, and those engaged in the publication, distribution and circulation of all media of expression, no matter how innocent, face prosecution under the multifarious state obscenity statutes.

The result of all of the aforesaid is a violation of one of the most basic principles known to the Law, to wit,

that a criminal statute must give fair warning of the conduct that it makes a crime. The failure of due process in this case is even more pronounced than the failure of due process in such cases as *DeJonge v. Oregon,* 299 U.S. 353, and *Cole v. Arkansas,* 333 U.S. 196. Where a person conducts himself in conformity with the constitutional standards and criteria enunciated by this Court, and where such innocent conduct is subjected to conviction and severe punishment, without notice that enforcement of the state statute is not subject to such standards and criteria, then conviction under such circumstances is not consistent with due process of law. "Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community." *Lambert v. California,* 355 U.S. 225, 230.

3. As a result of this Court's denial of the petition for a writ of certiorari, the state obscenity statute has been rendered so vague, ambiguous, uncertain and overbroad as to clearly violate the free speech and press provisions of the First and Fourteenth Amendments and to raise again the First Amendment and due process questions presented in *Roth v. United States* [*Alberts v. California*], 354 U.S. 476.

Concededly, the standards and criteria enunciated by this Court in *Roth, Jacobellis, Memoirs* and *Redrup* were themselves inherently lacking in precision. Virtually every member of this Court has expressed doubt as to the precise meaning of these standards. Justice Black has stated that "no person, not even the most learned judge much less a layman, is capable of knowing in advance of an ultimate decision in his particular case by this Court whether certain material comes with-

in the area of 'obscenity' as that term is confused by this Court today." *Ginzburg v. United States,* 383 U.S. 463, 481. Justice Harlan observed: "The central development that emerges from the aftermath of Roth v. United States, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498, is that no stable approach to the obscenity problem has yet been devised by this Court. . . ." *Memoirs v. Massachusetts,* 383 U.S. 413, 455. Justice Stewart stated: "It is possible to read the Court's opinion in Roth v. United States and Alberts v. California, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498, in a variety of ways. In saying this, I imply no criticism of the Court, which in those cases was faced with the task of trying to define what may be indefinable. . . ." *Jacobellis v. Ohio,* 378 U.S. 184, 197. Chief Justice Warren declared: "The definition enunciated in [*Roth-Alberts*] has generated much legal speculation as well as further judicial interpretation by state and federal courts. It has also been relied upon by legislatures. Yet obscenity cases continue to come to this Court, and it becomes increasingly apparent that we must settle as well as we can the question of what constitutes 'obscenity' and the question of what standards are permissible in enforcing proscriptions against obscene matter. . . ." *Jacobellis,* 378 U.S. at 199-200. See also, Justice Douglas in *Ginzburg v. United States,* 383 U.S. at 483, Justice White in *Memoirs v. Massachusetts,* 383 U.S. 413, 461, and the *per curiam* opinion in *Redrup v. New York,* 386 U.S. 767, 770-771.

The denial of the petition for a writ of certiorari here, which permits the judgment of conviction to stand, despite the fact that the books involved are well within the protective standards and criteria heretofore enun-

ciated by this Court and despite the fact that the record is devoid of guilty knowledge on the part of this petitioner, results in a broadening of the state obscenity statute and creates not only uncertainty and confusion for law enforcement officials and citizens alike, but necessarily creates a most pervasive censorship and invasion of protected freedoms. This Court has constantly reiterated that "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms". *NAACP v. Alabama ex rel. Flowers,* 377 U.S. 288, 307. The Court has emphasized that "precision of regulation must be the touchstone in an area so closely touching our most precious freedoms". *NAACP v. Button,* 371 U.S. 415, 438. Government, we have been told, "may regulate in the area only with narrow specificity" (*Id.,* 371 U.S. at 432-433). When one must guess what conduct or utterance may lose him constitutional protection, one necessarily will "steer far wider of the unlawful zone". *Speiser v. Randall,* 357 U.S. 513, 526.

All of these principles are undermined, it is submitted, by the denial of certiorari in the case herein, and the public's access to constitutionally protected expression is gravely endangered.

4. Petitioner recognizes that a denial of a petition for a writ of certiorari by this Court carries with it no implication whatever regarding the Court's view on the merits of a case which it has declined to review. "Pertinent considerations of judicial policy here come into play." *Maryland v. Baltimore Radio Show,* 338 U.S. 912, 918. It cannot be gainsaid however that the

effect of the denial of a writ of certiorari in this case is to affirm the judgment of conviction of this retail bookseller on standards and criteria which do not meet the requirements of the Constitution, and which result in the deprivation of liberty without due process of law and the abridgment of the exercise of freedoms of speech and press. The petitioner submits, therefore, that Justice Black was correct in his view that the petition for a writ of certiorari herein should be granted and the judgment reversed, and that, at the very least, the petition for a writ of certiorari should be granted and the case set for argument as Justice Douglas held. The questions presented are of great public importance which require determination by this court.

Conclusion.

For the reasons set forth above and in the petition for a writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a Writ of Certiorari issue to the Appellate Department of the Superior Court of the State of California for the County of Santa Clara.

Respectfully submitted,

STANLEY FLEISHMAN,
Counsel for Petitioner.

SAM ROSENWEIN,
Of Counsel.